IN THE

Supreme Court of the United States

October Term, 1967

No. 23

PATRICIA WALDRON, as Executrix of the Last Will and Testament of GERALD B. WALDRON, Deceased,

Petitioner,

—v.—

CITIES SERVICE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Is summary judgment appropriate when a defendant demonstrates to the satisfaction of the District Court and a unanimous Court of Appeals that there are no genuine issues to be tried and the plaintiff, after extensive discovery, has failed to produce any facts to support his conclusory allegation of conspiracy?

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* Petitioner's case against defendants British Petroleum Co., Ltd., Socony Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), and Texaco, Inc. is still pending in the United States District Court for the Southern District of New York.

Statement of the Case

Petitioner's* brief asserts and relies upon the alleged fact that he has been denied discovery and has yet to receive an answer to the complaint after 11 years. These assertions require, as part of our statement of the case, a review of the chronology of the case which demonstrates that petitioner's position is unfounded and untenable in light of his own conduct.

On June 12, 1956, seven large oil companies—British Petroleum Co. (formerly Anglo-Iranian Oil Co.), Gulf, Socony Mobil, Standard Oil Co. of California and New Jersey, The Texas Co. and Cities Service Co.—were served with a sweeping antitrust complaint demanding $109 million in damages. The plaintiff was Gerald B. Waldron.

Faced with this astronomical claim, three of the defendants, Standard Oil of New Jersey, Socony and Texas, immediately noticed the deposition of plaintiff. A procedural battle immediately commenced as to whether the defendants were to answer before they took the deposition of petitioner. Indeed, petitioner, in this $109 million lawsuit, refused to grant any of the defendants an extension of time to answer or move with respect to his complaint.

Judge Weinfeld of the Southern District ordered that the deposition of petitioner should start, and that the time of the defendants to answer should be extended until thirty days after the completion of petitioner's deposition. Tr. Vol. IV, 270; R. 11045-11048.** In accordance with the

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* Plaintiff, Gerald B. Waldron, died in November, 1964. His executrix is the petitioner. In accordance with the practice adopted in petitioner's brief, we shall refer to Gerald B. Waldron and his successor in interest as "petitioner".

** Tr. Vol. refers to Transcript of Record volume and page of portions of record printed pursuant to Supreme Court Rule 26. R. refers to record page of filed but unprinted record.

then accepted practice in the Southern District, defendants having obtained priority of examination by serving a notice first, Judge Weinfeld also stayed petitioner from conducting any pretrial proceedings until five days after service of motions or answers by defendants. *Ibid.*

The deposition of petitioner commenced on September 10, 1956 and continued until July 3, 1957. Tr. Vol. IV, 271. However, only 62 days of actual testimony were taken in this almost 10-month period—an average of about 6 days a month. All the adjournments were at petitioner's request or upon his consent. R. 377, 711, 1372, 1618, 2112, 3182. To the extent that the record reveals who requested the adjournments, it was petitioner. The record reveals none requested by defendants. In any event, every adjournment and extension of time was consented to by petitioner.

On July 3, 1957, counsel for petitioner announced that he would not permit petitioner to be examined further and that he intended to move to terminate the examination. R. 4212-4213. He made no such motion, however, until six months later, on December 30, 1957. Tr. Vol. IV, 272; R. 11049-11066.

That motion was decided on February 11, 1958, when Judge Herlands, finding no evidence of bad faith, harassment or lack of diligence on the part of defendants, denied petitioner's motion to terminate the discovery. Tr. Vol. IV, 272-273; R. 11159-11163. Judge Herlands did, however, limit the further examination to be conducted by defendants by setting up a schedule limiting the number of days each defendant might examine the petitioner and his associates and Judge Herlands ordered that petitioner be stayed from discovery until the completion of the depositions so scheduled. *Ibid.*

The order provided that the petitioner's examination be resumed on March 10, 1958 (Tr. Vol. IV, 273), but it was not so resumed.

Instead, at petitioner's insistence, the deposition schedule was postponed for another six months until September 15, 1958. Tr. Vol. IV, 224..

Accordingly, two years and three months had now passed during which a grand total of 62 days of examination of petitioner had taken place—or an average of less than three days a month.

The examination resumed on September 15, 1958, and, between that date and May 31, 1962, exactly 32 days of examination of petitioner—3½ of them by defendant Cities Service—and 58 days of examination of petitioner's associates, Nelson, Bentley, Zoes and Brown were conducted. Tr. Vol. IV, 273-276. Tr. Vol. III, 119, 123.

Thus, the total discovery by the seven defendants of petitioner and his four associates in the $109 million action consumed 159 working days. This discovery might reasonably have been conducted in a period of eight months (assuming 20 working days a month) to one year (assuming 13 working days a month). By reason of the delays of petitioner and his associates, the 8-month program took 6 years to complete.

Pursuant to the order of Judge Weinfeld, the time of defendants to answer or move against the complaint expired on June 30, 1962, and petitioner would have been permitted to commence his examination 5 days thereafter. Tr. Vol. IV, 270; R 11045-11048. See Tr. Vol. IV, 254-255. Pursuant to the later and superseding order of Judge Herlands, the stay of discovery by petitioner expired when the discovery program directed by Judge Herlands was completed—May 31, 1962. Tr. Vol. IV, 272-273; R. 11159-11163; Tr. Vol. IV, 254-255.

Accordingly, petitioner was, on June 1, 1962, entitled to proceed to conduct general discovery under the Federal Rules. Petitioner did not exercise those rights. He served no notices of examination. Instead, in a rather unusual maneuver, petitioner announced his intention to move to amend his complaint, although under the Federal Rules no such motion was either necessary or appropriate. (No answer having yet been served to the complaint, petitioner was free to amend his complaint as of right. Rule 15(a), Fed. R.Civ.P.)

Nevertheless, because of the alleged intention to move to amend the complaint, petitioner again deliberately postponed any general pretrial discovery to be conducted on his part. On May 31, 1962, he stipulated that on or before July 31, 1962 he would move to amend his complaint (although such motion was unnecessary), and that the motion would be returnable on September 24, 1962. Tr. Vol. IV, 256-258. The stipulation specifically extended the time of the defendants to answer or move, and thus if Judge Weinfeld's order was not superseded by Judge Herlands', this stipulation further extended the time during which the stay of petitioner's discovery contained in the order of Judge Weinfeld remained in effect. *Id.* at 257. If, as we believe, Judge Herlands' order superseded Judge Weinfeld's, the stay of discovery by petitioner had already expired. Either way, petitioner's failure to proceed with discovery was voluntary—not compelled.

No explanation has yet been given why this motion to amend the complaint was made, why the stipulation was entered, or why petitioner did not proceed with depositions.

Compounding the delay, on July 2, 1962, petitioner stipulated that his program for amending his complaint would be stayed until he completed discovery in connection with Cities' summary judgment motion referred to below. Tr.

Vol. IV, 259. No explanation has been given why petitioner thus voluntarily abandoned any effort to exercise his conceded right to receive answers or to conduct pretrial discovery of other defendants.

Notwithstanding the foregoing stipulations, and notwithstanding petitioner's motion to amend the complaint, no such motion was ever argued or decided. Instead, petitioner waited another year until July 12, 1963, when—without court permission, which he did not need in any event—he finally served and filed the amended complaint which he had been talking about for over a year. Tr. Vol. IV, 279.

Promptly after serving the amended complaint, however, he stipulated to extend the defendants' time to move or answer with respect to the amended complaint for another four months, until November 1, 1963. Tr. Vol. IV, 262-265. The effect of this stipulation was again voluntarily to extend the stay contained in Judge Weinfeld's order—if it was still in effect. Petitioner's activities since May 31, 1962 had resulted in wasting another year and one half and voluntarily delaying his discovery even further.

Accordingly, although petitioner by promptly complying with the discovery order could have commenced his discovery as early as mid-1957, by reason of his stipulations, requests for adjournment, requests for delay, motions for relief to which he was entitled under the Rules without such motions, and other dilatory tactics, the time of the defendants other than Cities, to answer did not expire until November 1, 1963—more than seven years after the commencement of this action. (Cities had already moved for summary judgment.)

On November 1, 1963, defendants, other than Cities, responded to the amended complaint by moving for summary

judgment on the ground that petitioner lacked either business or property, the jurisdictional requirement for maintaining a private treble-damage action. Petitioner sought and obtained extensions of time to oppose this motion until April 16, 1964—another four and a half months. Tr. Vol. IV, 281-284.

The motion for summary judgment by defendants, other than Cities, was argued on May 21, 1964, and denied on June 23, 1964.

There have followed further stipulations of one kind or another and informal agreements which have had the effect of voluntarily extending *sine die* the time of the remaining defendants in the action to answer the amended complaint and, as of this writing, they have not yet answered. See, *e.g.*, Tr. Vol. IV, 285-289; Tr. Vol. IV, 292-294. Why, Cities does not know.

And, despite the absence of any restriction upon petitioner's right to conduct general pretrial discovery since May 31, 1962, there have been no such pretrial proceedings; petitioner has not yet deposed a single defendant or witness, other than Cities.

As for Cities, the depositions were conducted only because Cities insisted that petitioner go ahead with the examination which he had been granted.

The circumstances were these:

Pursuant to Judge Herlands' order of February 11, 1958, Cities Service was granted the right to examine petitioner for a period of 10 days. Tr. Vol. IV, 272-273; R. 11159-11163. In fact, Cities exercised the right to examine for only 3½ days and that examination was conducted on October 26, October 27, October 28 and October 29, 1959. Tr. Vol. II, 80a-143a.

Petitioner's complaint against Cities was at that time a narrow one: that Cities had joined the alleged conspiracy in August or September, 1952. The complaint asserted that Cities was bribed into joining the conspiracy by being given the opportunity to purchase crude oil from Kuwait at a low price and by being allowed to participate in the Consortium. Complaint, ¶ 10(i)(6); Tr. Vol. II, 59a-61a. According to petitioner, Kuwait was a bribe, and Consortium was a reward.

The deposition of petitioner was designed to ascertain whether he had any other basis for suing Cities. As demonstrated below, he repeatedly testified that, but for his erroneous surmises about Kuwait and Consortium, he had no "evidence that Cities Service was party to a conspiracy." Tr. Vol. II, 110a-111a, and no reason to sue Cities. See pp. 16 to 18 below.

The documentary record established beyond preadventure that Waldron was wrong when he guessed, as he did, that Kuwait was a bribe and Consortium was a reward. Accordingly, promptly after Cities' deposition of petitioner, Cities moved for summary judgment. The motion was made on April 8, 1960, and was supported by 140 documentary exhibits demonstrating beyond any question that petitioner had guessed wrong. Tr. Vol. II, 146a-411a.

This motion was heard on May 9, 1960, and was decided on March 30, 1961. Tr. Vol. IV, 274; R. 11656. In his decision, Judge Herlands found that "the naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." Tr. Vol. I, 71a. Despite this finding, Judge Herlands felt bound by the then restrictive summary judgment rule of *Arnstein* v. *Porter,* 154 F.2d 464 (2d Cir. 1946) and adjourned Cities'

motion so that petitioner could conduct Rule 56(f) discovery on his only allegations—Kuwait and Consortium. *Ibid.*

Judge Herlands directed that Cities produce its officer and employee who had negotiated both the Kuwait contract and the Consortium, George H. Hill, Jr., for deposition on the 31st day after completion of the deposition program already scheduled. Order, May 3, 1961; Tr. Vol. I, 68a-69a.

Between the date of that order, May 3, 1961, and May 31, 1962, when the deposition program formally ended by stipulation, exactly 25 days of testimony of petitioner and his associates were taken—or less than 2 days a month.

The extraordinary patience which petitioner exhibited in permitting over a full year to be consumed by 25 days of examination was matched only by his reluctance in commencing the deposition of Cities which he was authorized to begin. By stipulation, the deposition program was concluded on May 31, 1962. Tr. Vol. IV, 254. (Absent the stipulation, the date would have been somewhat earlier, since defendants waived their right to examine the last witness.)

On July 2, 1962—the day when the Hill examination was to begin—petitioner *requested and stipulated* that his examination of Cities be adjourned from July 2, 1962 until September 10, 1962. Tr. Vol. IV, 259. The examination was further adjourned by stipulation from September 10 to October 10, 1962 (Tr. Vol. IV, 261) when it finally commenced.

After one day of deposition, however, petitioner adjourned it for another four weeks in order to give himself time to move for production of various documents. Tr. Vol. IV, 277, R. 10004.

Having secured the adjournment in order to make such a motion, petitioner failed to make the motion and Cities

itself was compelled to seek rulings "in light of plaintiff's now demonstrated desire to prolong and delay the completion of the Hill examination." Affidavit of Edward N. Costikyan, November 13, 1962. Tr. Vol. IV, 277.

Petitioner repeated his delaying tactics throughout his discovery of Cities.

Typical of the efforts of Cities to force petitioner to complete the examination were the statements made by Cities Service counsel, on an application to Judge Herlands by other defendants, for a protective order relating to certain documents sought by plaintiff:

"Judge Rifkind:

"Therefore it seems to me that we ought to be allowed to go forward and conclude this examination, if there be any further questions that Mr. Beshar wants to ask. The reason that I say that, your Honor, is—I need hardly repeat the argument that I made—the participation in this very noble party in which these tremendous corporations are involved is a very expensive sojourn for a little company like Cities Service, and since we are, in our view of it, innocent bystanders who just helped the plaintiff across the street when he was in trouble and otherwise had nothing to do with this transaction, we don't like to continue paying the extraordinary expenses involved in being a member of this very fashionable club. And I would like very much, your Honor, to conclude the Hill examination so that we can go ahead and complete the discussion of our motion for summary judgment. Transcript of Argument, November 7, 1962, p. 11, Tr. Vol. IV, 277.

"The Court: I understand from what has been said to me this afternoon that Judge Rifkind wants

to have the Hill examination go forward to its conclusion without delay. Is that right?

"MR. RIFKIND: That is exactly right." *Id.* p. 19.

Judge Rifkind also stated:

"I find myself in an utterly bewildered position, I made no motion when I came into court, your Honor. Mr. Sonnett made an application. He wanted . . . Mr. Beshar's examination of this witness [Mr. Hill] to be adjourned. The stipulation now reads that he shall go forward tomorrow unless the Court directs that he shall not, and I was urging your Honor not to say halt but to let the examination go forward tomorrow." *Id.* p. 25.

Subsequently, on the settlement of an order relating to the resumption of the Hill examination, Judge Rifkind stated to the Court in discussing the two proposed orders:

"The situation stands as follows, as it did on October 11: They wanted certain papers from us. We refused and we adjourned in order, if they so desired, to have an opportunity to get your Honor's ruling on that refusal. They did not take advantage of that opportunity, so our refusal persists.

"Now what is going to happen? Here we have lost a month and now we are going to lose another. We will go back. They will now ask for the paper. We will refuse. Then they will again go into court and ask for your Honor's direction. It seems to me that this is just a waste of time." Transcript of Argument, November 13, 1962, p. 49, Tr. Vol. IV, 277.

Despite these and other efforts to require petitioner to exercise his right to conduct depositions in order to resist Cities' motion for summary judgment, the deposition of

Mr. Hill was not completed until February 27, 1963. Tr. Vol. IV, 277.

Thereafter, Cities made every effort to bring its motion for summary judgment on for argument and to expedite a determination. During this period nothing other than his own stipulations or inactivity prevented petitioner from conducting any depositions of anybody he wanted to depose under Rule 30. His rights of discovery were restricted *only* to the extent that he sought deposition of *defendant Cities Service* pursuant to Rule 56(f) in order to resist Cities' motion for summary judgment.

In summary, by virtue of petitioner's conduct, a deposition program which would have been completed in eight months took six years. Since then, another five years have been consumed while petitioner sat by doing nothing except complaining about the orders entered in 1956 and 1957. Those orders, if they had any continuing validity after 1962, had it only because petitioner voluntarily agreed again and again to keep their restrictions against his discovery program alive.

The facts developed during these eleven years of desultory depositions have demonstrated beyond any question that petitioner has no claim against defendant Cities Service and that defendant Cities Service is entitled to and was properly granted summary judgment.

The Complaint

The complaint alleged that the defendants conspired to frustrate petitioners' efforts to sell expropriated Iranian crude oil in the United States under an alleged contract which petitioner obtained from the National Iranian Oil Company on May 25, 1952. It alleged the existence of an

oil cartel and in this respect was copied from a complaint in a civil action brought by the United States Government. *United States* v. *Standard Oil (New Jersey), et al.,* Civil Action. No. 86-27 (S.D.N.Y.). Cities was not a party defendant in the Government action nor was it charged in that action with any participation in any oil cartel.

The complaint in this case reflected Cities' separate and different status. The complaint alleged that:

1. A conspiracy in restraint of interstate and foreign commerce in oil, begun in 1928, was, in 1934, joined by all [redacted] named defendants *"except Cities Service"*. Com[redacted]t, ¶¶ 8, 9 and 10(f); Tr. Vol. II, 48a-54a.

2. Pursuant to the conspiracy, all the defendants, *other than Cities Service,* have controlled foreign production and supplies of oil, divided foreign and domestic producing and marketing territories, fixed prices, controlled available tanker facilities, and engaged in other antitrust violations. *Id.,* ¶¶ 8, 9 and 10; Tr. Vol. II, 48a-63a.

3. In May, 1951, the Iranian Government nationalized the oil properties of defendant Anglo-Iranian (now British Petroleum). *Id.,* ¶ 10(i); Tr. Vol. II, 55a-56a. According to the complaint, defendants *"other than Cities"* then agreed not to deal in Iranian oil until they could preserve the allocations established by conspiratorial agreement. *Id.,* ¶ 10(i)(2); Tr. Vol. II, 56a-58a.

4. After petitioner obtained his alleged oil contract on May 25, 1952, from the National Iranian Oil Company, petitioner claimed defendant Anglo-Iranian (now British Petroleum) threatened him and others that legal action would be taken against them if they dealt

in the nationalized oil. *Id.*, ¶ 10(i)(2); Tr. Vol. II, 56a-58a. Petitioner claimed Anglo-Iranian (British Petroleum) and other defendants *"excepting Cities"* instituted a boycott of Iranian oil in order "to force the Iranian Government to return its oil concessions, if not to Anglo-Iranian in whole, at least to the defendants jointly, *excepting Cities Service,* under such terms as would preserve the essential allocations previously agreed upon . . ." (emphasis added) *Id.*, ¶ 10(i)(2); Tr. Vol. II, 57a-58a.

5. Petitioner never sold any of the oil to which he had access under his contract, and his inability to do so was allegedly the result of a boycott. He claimed that defendants *"other than Cities Service"* (i.e., New Jersey Standard, Texas, Socal, Gulf and Socony) "refused to purchase Iranian oil from plaintiff"; threatened their "subsidiaries, agents or purchasers with being 'barred from purchasing petroleum and products owned or controlled by defendants'"; and "caused normal and customary financial services necessary to the transaction of international business to be denied to plaintiff". *Id.*, ¶ 10(i)(2), (3), (4), (5); Tr. Vol. II, 56a-59a.

6. Petitioner's efforts to market Iranian oil were finally frustrated by the entry on October 29, 1954, of defendants *other than Cities Service* (*i.e.*, Anglo-Iranian (British Petroleum), New Jersey Standard, Socal, Texas, Gulf and Socony) into a "Consortium" which divided up substantially all Iranian oil production among these defendants. *Id.*, ¶ 10(i)(9); Tr. Vol. II, 62a.

The Unusual Role of Cities as Alleged

Petitioner thus cast Cities in a unique and peripheral role. He specifically alleged that Cities had no oil interests in the Middle East prior to 1952, and that it was not a member of the alleged oil cartel. Complaint, ¶ 10(i)(6); Tr. Vol. II, 59a-60a.

In fact, petitioner pleaded that Cities, as an independent, sought to aid petitioner in his Iranian venture in the face of the alleged boycott and threats of the other defendants. Petitioner asserted that he approached Cities in July of 1952 and Cities "indicated . . . a great interest in purchasing [petitioner's] entire supply and obtaining a managerial contract for all Iranian oil exploitation and production from the Iranian Government" (*Id.*, ¶ 10(i)(6); Tr. Vol. II, 59a). In August of 1952, W. Alton Jones, then president of Cities, went with petitioner and several staff aides to Iran and inspected the oil facilities there. According to petitioner, Cities then "proposed to the National Iranian Oil Company that over a course of years Cities Service would exploit and manage the Iranian oil resources . . ." *Id.*, ¶ 10(i)(6); Tr. Vol. II, 60a.

A single subparagraph of the complaint then stated petitioner's charges against Cities. Tr. Vol. II, 60a-61a.

Petitioner's Charges Against Cities Service: Kuwait as a Bribe and Consortium as a Reward

Cities allegedly joined the alleged conspiracy for the first time "during late August or early September, 1952", when it was enticed by the alleged conspirators Gulf and Anglo-Iranian into breaking off negotiations with plaintiff concerning Iranian oil. *Id.*, ¶ 10(i)(6); Tr. Vol. II, 60a.

Petitioner asserted two reasons for Cities' alleged behavior:

First, the complaint charged that Gulf and Anglo-Iranian bought off Cities by offering it, in August or September, 1952, a long-term supply of crude oil from Kuwait at a favorable price which Cities accepted. *Id.*, ¶ 10(i)(6); Tr. Vol. II, 60a-61a. According to the complaint:

> "*At this time and by these acts* Cities Service, without the knowledge of plaintiff, entered into combination and conspiracy with the other defendants . . ." (emphasis added) *Id.*, ¶ 10(i)(6); Tr. Vol. II, 60a.

Secondly, petitioner attempted to link Cities to the alleged conspiracy by alleging that "as a further consequence of this conspiracy" Cities was allowed by the other defendants to "gain a participation" in the Iranian Oil Consortium which was entered into more than two years later by defendants other than Cities Service. *Id.*, ¶ 10(i)(6), (9); Tr. Vol. II, 61a-62a.

Waldron's Deposition

Cities' examination of the petitioner on his $109 million claim lasted only 3½ days. In the examination, petitioner repeatedly conceded that but for two alleged acts—the alleged Kuwait deal and the alleged offer to Cities of a Consortium participation—he had no complaint against Cities and would not have joined Cities as a defendant in this action. He testified:

> "Q. Do you put them [Cities Service] into the conspiracy which you allege, which you say began in 1928?
>
> A. No, sir.
>
> Q. You don't put them into this conspiracy until a very much later date, is that right?
>
> A. That's correct.

Q. And what is the later date that you pick as the date on which you said they joined this conspiracy of the other defendants?

A. The latter part of 1952 or the first part of 1953.

Q. And what is the event which you believe justifies you in saying that they joined this conspiracy?

A. The event was when they made the arrangements with Gulf Oil Corporation to take oil from Kuwait.

Q. It is that event which led you to believe that Cities Service joined the conspiracy?

A. As well as their ending up in the International Oil Consortium in Iran.

Q. That came later?

A. Yes."

* * *

"Q. The event that you know of is the making of the contract with the Gulf Oil Company?

A. Yes, sir.

Q. And that is why you put Cities Service into this complaint as a defendant; is that right?

A. That's one reason.

Q. And the other reason is the Consortium?

A. The Consortium. That's all the reasons that I know of at this time."

* * *

"Q. And of this morning you are telling me—and I assume truthfully—that the two events which you identify as causing you to name Cities Service as a defendant are the contract with Gulf and the entry into the Consortium?

A. Yes, sir."

(Deposition of Gerald B. Waldron, Tr. Vol. II, 85a-86a).

"Q. Isn't that a correct statement of affairs, that with respect to the entire conspiracy recited in sub-

divisions 8 and 9, [of the complaint] down to Kuwait, down to the making of the Kuwait contract, you have no complaint with respect to Cities Service?

A. In general, I would say that is correct, sir."

(Deposition of Gerald B. Waldron, Tr. Vol. II, 102a).

The deposition established that Cities was interested in something other than the purchase of a few cargoes of Iranian oil, which, if anything, is all petitioner had to sell. Petitioner testified:

"We learned that Cities Service Company was interested in taking over the refinery at Abadan and all of the Iranian oil installations."

* * *

"Q. Was it your impression that you generated this notion of taking over the refinery and managing the whole Iranian oil business?

A. No.

Q. You discovered that to be there when you first contacted the Cities Service people?

A. Not on the first contact with them.

Q. But shortly thereafter?

A. Some time thereafter."

(Deposition of Gerald B. Waldron; Tr. Vol. II, 80a).

* * *

"Q. Did they ever negotiate with you for the purchase of oil under your contract independent of any other relationship they might have with the Iranian supply?

A. No."

(Deposition of Gerald B. Waldron; Tr. Vol. II, 100a).

The First Episode in Cities' Motion for Summary Judgment: April 8, 1960

Petitioner's conjecture about Kuwait oil and the Consortium was wholly and totally wrong. On his deposition, petitioner testified that he joined Cities as a defendant in this colossal $109 million antitrust action on the basis of a newspaper clipping which petitioner read in *1954* which stated that a deal had earlier been consummated between Cities and Gulf on Kuwait oil and on a snatch of conversation in petitioner's presence in August or September 1952 by W. Alton Jones, then president of Cities, who allegedly stated that he had had an offer for oil from across the Gulf, presumably Kuwait, at $1.00 a barrel (Deposition of Gerald B. Waldron; Tr. Vol. II 87a-94a).

Petitioner conceded at his deposition that he had no oral or written evidence to support his allegation that Anglo-Iranian (British Petroleum) and Gulf conspired at any time to make an offer of Kuwait oil to Cities, much less that the offer was made, as alleged, in August or September, 1952 in order to buy off Cities. He was *"guessing."* He also *"guessed"* that the offer was made in August or September 1952, and he admitted Jones did not say when the offer was received (Deposition of Gerald B. Waldron; Tr. Vol. II 88a-89a).

As for the Consortium, petitioner admitted he had nothing to support his allegation—nothing in writing, no conversation. His empty response to a request for specific information was only, "The events speak for themselves"—an inference petitioner drew "from the fact that [he believed] Cities Service was offered, was permitted to purchase a participation in the Consortium." (Deposition of Gerald B. Waldron; Tr. Vol. II, 95a-96a).

Petitioner was wrong on both Kuwait and Consortium.

Kuwait

Petitioner entirely mistook the timing and nature of the Kuwait contract. The documentary evidence demolishing his speculations was overwhelming. It established that Gulf and Cities began negotiating for the purchase by Cities of Kuwait oil as early as 1948, and that the essential contract terms were buttoned up before Cities even heard of the petitioner, let alone talked to him.

Discussions began in 1948 (Tr. Vol. II, 168a-169a); price and delivery terms were reached in early 1951 (Tr. Vol. II, 181a-184a); the detailed price formula was agreed on in early 1952 and a draft of the contract which contained the essential terms embodied in the final contract, was approved by both sides in June, 1952—all before Cities had its first contact with petitioner. Tr. Vol. II 157a-160a. There was no improvement in any of the terms following petitioner's entry upon the scene. —The"most favored nation clause" referred to by petitioner (Pet. Br. pp. 20, 61) was *not* a "clause" at all but a separate letter containing a pious declaration by Gulf of what it *believed* its policy *would* be vis-a-vis Cities if Gulf sold Kuwait oil to some one else in a similar transaction at a better price. R. 9914-9915, Pltf's Ex. CS-12.

Ironically, Cities' documents proved that on the very day petitioner met Cities personnel for the first time, July 8, 1952, the Operating Committee of Cities formally approved the proposed agreement (Exhibits 2-28 in Support of Cities' Motion for Summary Judgment, April 8, 1960; Tr. Vol. II, 168a-280a; Affidavit of George H. Hill, Jr. April 8, 1960; Tr. Vol. II, 154a-161a).

Consortium

Similarly, petitioner's allegation—admittedly based upon petitioner's guess—that Cities was further rewarded by the

alleged conspirators by being offered a participation in the Consortium was also destroyed by documentary evidence.

It established that Cities never became a member of the Consortium.

It further established that Cities' *opportunity* to participate was not the result of agreement with other defendants—but was the result of an invitation to participate extended to the entire oil industry by the *United States Department of State.*

Cities' application was approved by Price Waterhouse & Company, which was designated by the State Department as a "qualified and disinterested party" to pass upon the qualifications of applicants for a participation. Cities was advised of its acceptability by the State Department not the defendants. The minuscule percentage allocated to Cities—.45 of 1%—was made after intense dispute among the applicants, and after informal consultation with Mr. Herbert Hoover, Jr., the Undersecretary of State who resolved the dispute *against* the position taken by Cities. The other defendants played no role in this allocation.

Moreover, it is clear that Cities fought unsuccessfully to gain more than a minimal interest in the Consortium, and, failing in that effort, elected not to participate at all (Exhibits 29-59 in support of Cities' Motion for Summary Judgment, April 8, 1960, Tr. Vol. II, 281a-370a; Affidavit of George H. Hill, Jr., April 8, 1960, Tr. Vol. II, 161a-167a.

Judge Herlands' Opinion of March 30, 1961 on Cities' Initial Motion

Defendant Cities Service, as soon as was practicable after its 3½ day deposition of petitioner, moved for summary judgment. It relied upon the undisputed documentary evidence which demonstrated that the Kuwait transaction

long antedated anything to do with petitioner and that the Consortium was no reward to Cities.

Judge Herlands, however, felt constrained not to grant the motion but to hold it in abeyance because of the narrow construction which the Second Circuit had placed on Rule 56. Judge Herlands stated:

> "But for the prevailing strict policy in this circuit with respect to the invocation of the summary judgment procedure, the court would have granted the motion. This court has examined virtually every reported summary judgment decision rendered in this circuit since *Arnstein* v. *Porter,* 154 F.2d 464 (2d Cir. 1946), over one thousand in number. The rationale and philosophy of *Arnstein* v. *Porter* have not been attenuated by the subsequent course of decisions."

(Opinion, March 30, 1961, Tr. Vol. I, 71a). He observed, however:

> "1. It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact with respect to his claim against the defendant Cities Service Co.
>
> "2. The naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events."

(*Id.,* Tr. Vol. I, 71a).

Judge Herlands adjourned Cities' motion for summary judgment until petitioner had an opportunity to engage in discovery under Rule 56(f). The Court noted:

> "Because plaintiff's claim against the defendant Cities Service Co. is, judged by the entire available record,

> so insubstantial, the plaintiff will not be given carte blanche authority to conduct untrammeled pre-trial proceedings. . . . The usual Federal rule permitting fishing expeditions will be curtailed. A just and workable balance will be maintained between the respective interests of the opposing parties." *Id.* 72a.

Pursuant to this opinion, Judge Herlands directed that Cities produce its employee, George H. Hill, Jr. who had been in charge of both Kuwait and Consortium for petitioner's examination. *Id.* 68a-70a.

As noted above, pp. 9 to 12, it was on defendant Cities' insistence that the deposition was finally completed. Six days of testimony were taken in the 8-month period between July 2, 1962 and February 27, 1963.

Cities' Motion for Summary Judgment, Second Episode: May 13, 1963

After Hill's deposition, Cities renewed its motion for summary judgment on May 13, 1963. At that point, petitioner had even less to go on than he did when he first filed his complaint. For, although the petitioner had conducted extensive examination of George H. Hill, Jr. of Cities, he had receded from the position he had reached in 1961, when Judge Herlands noted that "(t)he naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." Tr. Vol. I, 71a.

In opposition to Cities' renewed motion, petitioner could not point to a single fact he had gleaned in the three years since Cities first made its motion which indicated he was entitled to a trial.

And what he had learned destroyed the "gossamer inference".

Petitioner Abandons the Kuwait and Consortium Theories

The documentation on the summary judgment motion and on the Hill deposition, and Mr. Hill's testimony, had demonstrated that petitioner was totally wrong in his guesses about Kuwait and Consortium.

Petitioner thereupon abandoned those claims. Indeed, petitioner later told the Court below, as to the Consortium:

> "[I]n fact, Cities watched with resentment when the Iranian pie was ultimately cut up [through the Consortium] by the seven international majors in a manner characterized by Cities as creating a monopoly for these companies." Affidavit of Samuel M. Lane, September 15, 1964, p. 20; Tr. Vol. I, 146a.

And the Court below found:

> "[T]he record, as it now stands, conclusively establishes that both the Kuwait contract and participation in the consortium had no connection whatever with the course of Cities' conduct with regard to Iranian oil."

(Opinion, September 8, 1965, Tr. Vol. I, 12a.)

Petitioner's New Theory: Turnabout—Cities' Alleged Loss of Interest in Iranian Oil

In an effort to keep his case against Cities alive, petitioner invented a new theory. He asserted that in September 1952, Cities executed a 180° turn and changed its position concerning Iranian oil. According to petitioner, this complete turnabout occurred between the time W.

Alton Jones, then president of Cities, went to Iran and the time of his return to the United States. When Mr. Jones was in Iran in August and September 1952 Cities was deeply interested in Iranian oil. And, said petitioner, when Mr. Jones reached Paris on his way back from Iran, in late September 1952, he indicated that Cities was no longer interested in Iranian oil.

Petitioner asserted: although Cities had the entire Iranian oil industry in its grasp, it terminated its relations with the petitioner and dropped its interest in Iranian oil. From this alleged fact, petitioner leaped to the conclusion that this "turnabout" evidenced Cities joining the alleged conspiracy.

There is no issue whatsoever as to when this turnabout was alleged by petitioner to have taken place. His lawyer stated:

> "MR. LANE: [C]ities Service came into this conspiracy . . . at the time when Waldron and Jones parted company in Iran [September, 1952].
>
> "THE COURT: What evidence have you got or clues or leads or hearsay or anything other than speculation?
>
> "MR. LANE: . . . What I say is they [Cities and Waldron] went to this point together as opponents of the cartel, and when they reached this point Cities Service made a 180-degree turn and from that time on was in with the cartel and opposed to Waldron."
>
> (Tr. Vol. III, 109-110)
>
> "THE COURT: When you say there was a 180-degree turnabout, will you give me your before-and-after description showing me the 180-degree turn. . . ?

"MR. LANE: *I can date it.* That is all I can do. I can say that when Waldron left Iran [September 1952], Jones' mood was, if the Anglo-Iranian Oil Company doesn't like it, we will pour it down their throats. I can say that after Waldron left Iran and went to Paris [September 1952], the Jones party went to Kuwait [September 1952]. Then when the Jones party then came to Paris [September 25, 1952], they said there is billions in this, but we may have struck a dry hole.

"THE COURT: Is that when the conspiracy was joined by Cities Service, according to you?

"MR. LANE: In point of time according to us that is it."

(Tr. Vol. III, 108-109)

In his brief here, petitioner makes the same claim. Pet. Br. p. 64.

Petitioner himself never drew the inference which he now asks the Court to draw from Cities' conduct in September, 1952. Thus, after petitioner was allegedly aware of Cities' alleged loss of interest, he maintained the most cordial relations with Cities' officials, including attending a dinner party with them (Tr. Vol. II, 115a-118a), seeking compensation from them (*Id.* 122a-129a), maintaining friendly relations with them (*Id.* 133a-134a), and seeking to sell chemicals to them (*Id.* 136a-139a). Petitioner testified to a meeting with Mr. Watson of Cities in March of 1953, at which he had nothing but the most cordial feeling towards Cities. He testified:

"Q. Did you threaten to sue him? [Mr. Watson]?

A. No, sir.

Q. Did you indicate to him that if he didn't pay you you would take any kind of reprisals against him?

A. No, sir.

Q. Did any such thing cross your mind?

A. No, sir.

Q. And when you left the office, you and Nelson felt that it was a rather easy meeting?

A. Yes.

Q. You were quite pleased?

A. Yes."

(Tr. Vol. II, 128a)

In short, petitioner asked the Court below to draw an inference of conspiracy from facts which contemporaneously and *ante litem motam* failed to move petitioner to the untenable conclusion upon which he now relies.

In any event, within a year, petitioner abandoned this turnabout theory after he had successfully obtained further depositions based upon its assertion. This abandonment is discussed below. See pp. 29 to 33.

Petitioner Amends His Complaint

In addition to abandoning Kuwait and Consortium and inventing Turnabout, petitioner made a further effort to avoid summary judgment while Cities' renewed motion for summary judgment was pending. Petitioner amended his complaint and dropped his specific allegations concerning Kuwait and the Consortium. In their stead, he substituted a more vague and even less substantial claim. He alleged:

"Defendants, Anglo-Iranian, Socony, Socal, Jersey, Texas and their co-conspirators Gulf and Royal Dutch, with the aid of others, secretly threatened, induced and conspired with defendant Cities Service to break off all dealings with plaintiff and not to proceed further with its demonstrated interest in dealing in Iranian petroleum and products, including the man-

agement of certain aspects of the Iranian petroleum industry." (Amended Complaint, June 28, 1963, ¶ 13(g), p. 19; Tr. Vol. I, 80a)

In place of the two specific allegations in petitioner's original complaint, petitioner's counsel substituted a series of hypothetical questions:

> Did Cities Service conspire for some unknown consideration?
>
> Did Cities Service conspire for *no* consideration?
>
> If Cities Service did not join a conspiracy, why did Cities Service "pull out" of Iran? (Stenographer's Minutes, Argument of May 27, 1963, p. 14; Tr. Vol. II, 421a. See also Opinion, Herlands, J., June 23, 1964, pp. 40-41; Tr. Vol. I, 56a)

Judge Herlands' Opinion of June 23, 1964

On these papers, petitioner persuaded Judge Herlands not to grant Cities summary judgment, despite Cities' overwhelming demonstration, without first providing the petitioner with another opportunity to discover evidence to support his assertions.

Judge Herlands said:

> "Plaintiff contends that, in order to substantiate its claim that Cities Service was bought off and to flush out evidence as to what constituted the payoff, he must have further discovery.
>
> "Rule 56(f) motions should be liberally granted [citations omitted], especially where, as here, all of the allegedly material facts are within the exclusive knowledge of the opposing party . . .
>
> "Since plaintiff must—if he is to oppose successfully Cities Service's summary judgment—eventually

submit 'specific facts' which 'would be admissible in evidence' [Rule 56(e)], plaintiff should be given another opportunity to conduct pre-trial discovery.

"Plaintiff will be allowed to examine Burl S. Watson [the Chief Executive of Cities], A. P. Frame and J. E. Heston, all of Cities Service Co., in accordance with the order to be settled on June 30, 1964."

(Opinion, June 23, 1964, Tr. Vol. I, 56a-58a).

And so, once again, Cities' summary judgment motion was adjourned.

The second discovery order permitted the petitioner to inquire on the alleged issue of whether Cities' alleged change of position was the result of a conspiracy with other defendants. The discovery order encompassed conversations and communications during the period when, petitioner alleged, Cities' change of heart could be demonstrated—June 11, 1952 through November 1, 1952. The order granted examination concerning communications between Cities and other defendants pertaining to:

"(a) The two issues defined in the Court's Order filed May 4, 1961; [Kuwait and Consortium]

"(b) Conversations and communications, written or oral, from on or about June 11, 1952, to, on or about October 1, 1952, between defendant Cities Service Company and any other defendant pertaining to:

"(1) Waldron, Brown, Nelson, Bentley, Zoes, or Carter;

"(2) The refining, marketing, distributing, producing or managing of Iranian oil;

"(3) Plaintiff's proposed deal, contract, agreement or other arrangement with the Iranian Government;

"(4) The subject of defendant Cities Service Company's giving up, terminating, dropping or discontinuing negotiations with the Iranian Government in regard to any of the matters mentioned in item (2) *supra*."

(Order, Herlands, J., July 9, 1964; Tr. Vol. I, 18a-19a).

Examination was also ordered concerning internal communications within Cities' organization between June 11, 1952 and November 1, 1952 pertaining to all of these items. *Ibid.*

On July 27-31, 1964 petitioner deposed Burl S. Watson, the chief executive of Cities, who was familiar with all aspects of Cities' activities in Iranian oil.

On July 23-24, 1964 he deposed A. P. Frame, Cities' first Vice President who took part in the trip to Iran by Cities' officials.

On August 3-4, 1964 he deposed J. E. Heston, Cities' Manager of oil production, who had also participated in the Iranian trips.

At this point, petitioner had examined every surviving employee or officer of Cities who, he asserted, had any knowledge concerning the facts as to which petitioner claimed there was an issue.

Over 700 pages of transcript were taken and more than 140 documents were marked.

The depositions of Cities' officials and the contemporaneous writings demonstrated beyond any doubt what Cities

has maintained from the beginning of this action—that Cities' interest in Iranian oil continued after September 1952, that Cities did not have any change of heart as the petitioner alleged, and that Cities continued to search for a solution to the British-Iranian dispute long after Waldron went back to Denver—which he did in October, 1952.

Indeed, the documented record destroyed petitioner's theory that Cities became a conspirator when it had a "change of heart." For petitioner's basic premise was wrong—the documentary evidence established that Cities never had a change of heart.

Thus, the documented record is clear that, immediately after his trip, Jones reported to high State Department officials and engaged in continuing discussions with them, as well as with the Iranian Ambassador to the United States and with the United States Ambassador to Iran (Hill Supplemental Affidavit, May 20, 1960, Exhibits 65, 67, 69, 70, 77 and 80; Tr. Vol. II, 371a-374a, 383a, 385a, 388a-391a, 402a, 407a-408a). In addition to corresponding and meeting with these officials, he also wrote to Premier Mossadegh as late as July 10, 1953, conveying his suggestions for solving the vast and complex British-Iranian oil dispute (*Id.*, Exhibit 81; Tr. Vol. II, 409a-411a).

In January 1953, after the alleged "change of position," Jones sent copies of a legal opinion which he had obtained from John W. Davis, Esq. to influential members of the incoming Eisenhower administration—the Secretary of State and the Attorney General. The opinion declared that Iran was correct in its contentions in the dispute over expropriation and that the position which petitioner ascribes to the alleged conspirators was wrong (*Id.* Exhibits 72 and 73; Tr. Vol. II, 394a-398a).

Strange conduct for a co-conspirator to engage in. Nothing could have placed Cities in greater conflict with the alleged conspirators than these activities.

In addition, in November 1952, Jones had Cities furnish Iran with spare parts for the Abadan refinery (*Id.*, Exhibit 66; Tr. Vol. II, 384a). In October 1952, he had Cities' officials send technical advice to the National Iranian Oil Company to aid them in operating their refinery (*Id.*, Exhibits 60 and 62; Tr, Vol. II, 375a, 378a). In November and December 1952, Cities prepared a group of key technical personnel to go to Iran to help in reviving oil production. Plans concerning the lending of such technical personnel were drawn up and transmitted to the Iranian Ambassador to the United States and to Iranian officials abroad in December 1952—again after the alleged "change of position." These efforts continued until July 1953, when Cities informed Iran that the United States State Department had refused to approve the project (*Id.*, Exhibits 61, 68, 69, 74, 76, 77, 78, 79 and 80); Tr. Vol. II, 376a, 386a-387a, 388a, 399a, 401a-408a).

And there was more.

But apparently this was convincing enough to petitioner. "Change of Position" was soon to follow "Kuwait" and "Consortium," into Limbo.

Petitioner Recants Again: The Turnabout or Change of Position Claim—That Cities Lost Interest in Iran After October 1952—Is Not Only Abandoned, But Reversed

After the impact of the foregoing facts were brought home to petitioner, he abandoned "turnabout." Following all of the discovery, and in his final resistance to the motion for summary judgment, petitioner's attorney advised the Court:

> *"It does not happen to be the fact, however, that Cities lost interest in Iranian oil.* Contrary to what plaintiff was told, Jones (President of Cities) continued to take a 'keen interest' in Iranian oil, as Watson, himself, admitted; a special "Iranian room' was set up at Cities' New York office and put in the charge of a young Iranian woman who looked after the files;" [Emphasis added] (Affidavit of Samuel M. Lane, September 15, 1964; Tr. Vol. I, 146a.)

And the district court thereafter found that the evidence "demonstrates a consistent course of conduct by Cities with regard to Iranian oil at all times." Opinion, September 8, 1965, Tr. Vol. I, 12a.

Petitioner's agreement that Cities did not lose interest in Iranian oil marked the end of petitioner's last "gossamer inference." For, when the unfounded premise of Cities' change-of-heart disappeared, there was not even a shadow from which petitioner could draw a thread of conspiracy.

Change-of-heart, like the Kuwait and Consortium speculations, had led to years of fruitless and wasteful litigation. Once again, Cities had been put to the expenditure of money and time of accompanying petioner on a wild goose chase in search of a conspiracy.

Petitioner's Last Gasp: The Richfield Oil Transaction

Petitioner maintains that he attempted to sell oil to the Richfield Oil Company in the summer of 1953 (Pet. Br., pp. 20-21). These negotiations were conducted after his alleged contract giving him access to Iranian oil had expired.

In any event, petitioner asserts that Richfield's refusal to purchase oil *may have been* the result of interference by

Cities. Petitioner does not allege that it *was* the result of such interference.

Nor can he. For petitioner's suspicion as to Richfield is totally unsupported by a single fact.

Petitioner, on his deposition, admitted that at the time he drafted the complaint in 1956 he had no factual basis whatsoever to make the Richfield charge, nor did he have any factual basis to support that charge at the time of his deposition on October 26, 1959:

> "Q. I am asking you what evidence you have, written or oral, that Cities Service brought about Richfield's decision with respect to Iranian oil.
>
> A. None as yet."

Deposition of Gerald B. Waldron, Tr. Vol. II, 114a.

Nevertheless, Judge Herlands permitted the examination of Cities by its officials, Watson, Frame and Heston, on all conversations and communications from June 11, 1953 to September 30, 1953—the period specified by petitioner—between Cities and Richfield and any defendant pertaining to the negotiations between petitioner and Richfield Oil Corporation concerning the purchase of Iranian oil. Tr. Vol. I, 19a. Similarly, internal communications among Cities Service personnel, concerning the same subject matter, were ordered disclosed. *Ibid.*

Again, an empty allegation based on unfounded suspicion and on speculation without the barest factual support, led to an expensive and extensive search for nonexistent evidence.

fendants, cites the Hill memorandum as support for that statement. Tr. Vol. I, 146a.

4. Cities' complaints about the proposed Consortium plan and the role of the independents continued until the spring of 1955, when Cities declined to join the Consortium because the participation offered to it was so miniscule.

In light of this documentary evidence and petitioner's own admissions, his contention that *maybe* Cities induced Richfield not to deal with petitioner in the summer of 1953, thereby joining the other defendants in a conspiracy to frustrate his efforts to market Iranian oil, becomes absurd. Petitioner must assert the incredible hypothesis that, although Cities was a nonconspirator throughout the period in question, it nevertheless joined the alleged conspiracy for an instant of time in order to prevent Richfield from purchasing oil from him.

It is incredible that, in the course of Cities' admittedly single, uniform, consistent nonconspiratorial pattern of conduct, Cities, pursuant to and as part of the alleged conspiracy it opposed, quietly engaged in a little coercion on Richfield to prevent Richfield from purchasing Iranian petroleum from petitioner under an expired contract. This wild speculation is unsupported by any evidence and is rebutted by all of the available evidence. It is as irrational a basis for creating an issue of fact on a summary judgment motion as those discussed by this Court in *Griffin* v. *Griffin*, 327 U.S. 220 (1946), where this Court held that a claim bottomed solely on "unsupported suspicions" could not withstand a motion for summary judgment:

> "Only a word need be said as to petitioner's defense that the judgment was procured by fraud. Although his answer pleads his legal conclusion that the judgment is not entitled to recognition because of 'gross

fraud in its incidents, and in its procurement,' etc., etc., his answer sets up no facts showing the alleged fraud. A part of his answer and an unverified statement filed by petitioner in response to the motion for summary judgment were ordered stricken and scandalous. In these the charge of fraud is elaborated by general statements that the machinations of the New York counsel of the parties, and their racial, religious and political affiliations with the judges who have presided over the various phases of the New York litigation, have resulted in the failure of justice exemplified by the several decisions adverse to petitioner. We have examined these assertions and find that the only support for them so far as appears, is petitioner's unsupported suspicions. We find this no basis for the allegation that the judgment was procured or in some way affected by fraud, or for the contention that the offensive matter was improperly stricken". 327 U.S. at 235-236.

Cities' Motion for Summary Judgment, Third Episode: October 16, 1964

Cities renewed its motion for the third time in October, 1964. The motion was argued for the third time in February, 1965. The decision was rendered in September, 1965.

In his opinion Judge Herlands noted that Rule 56(e) had been amended since the case had begun to overcome the restrictive judicial interpretation placed on the summary judgment rule in the Second and other circuits. The 1963 amendments to the Federal Rules require specific facts or evidentiary data to be presented by a party opposing summary judgment. Judge Herlands had given the petitioner broad opportunities to discover the specific facts which he would have to submit in order successfully to oppose Cities'

overwhelming demonstration that it was entitled to summary judgment.

Judge Herlands, in granting Cities' motion, stated:

> "The single issue before the court relating to Cities' motion for summary judgment, is whether plaintiff's discovery has unearthed a 'genuine issue [of fact] for trial' where nothing had existed before but 'suspicion' and 'gossamer inference drawn from the mere sequence of events.'"
>
> (Opinion, September 8, 1965; Tr. Vol. I, 10a-11a)

Summarizing petitioner's position, Judge Herlands noted that petitioner relied on the sequence of events, claiming that an alleged "change of heart and mind" of Cities showed that Cities had joined the alleged conspiracy. *Id.*, at 11a.

Judge Herlands summarized the results of petitioner's exhaustive examination of every Cities official who had accompanied Cities' President Jones to Iran in August 1952, and all those who would be able to link Jones' activities at that time with the alleged conspiracy as follows:

> "The examinations of Watson, Frame and Heston have not produced any evidence from which a trier of fact would be permitted to infer that the Kuwait oil contract and participation by Cities in the consortium were consideration for Cities' allegedly dropping its interest in Iranian oil and joining the alleged conspiracy against plaintiff. On the contrary, the record, as it now stands, conclusively establishes that both the Kuwait contract and participation in the consortium had no connection whatever with the course of Cities' conduct with regard to Iranian oil." *Id.;* Tr. Vol. I, 11a-12a.

Judge Herlands then dealt with the heart of petitioner's revised complaint:

> "Plaintiff's major premise throughout this litigation with regard to Cities has been that, for some reason, Cities did a complete turnabout with respect to its interest in Iranian oil. Not only has the evidence thus far adduced demonstrated that the alleged turnabout was not motivated for the reasons originally advanced by plaintiff [Kuwait and consortium], but the evidence has brought into serious doubt the existence of the major premise itself—a turnabout or change in attitude. Rather, the evidence persuasively demonstrates a consistent course of conduct by Cities with regard to Iranian oil at all times." *Id.*, Tr. Vol. I, 12a.

Judge Herlands was explicit on what elements were missing from petitioner's position:

> "The crucial facts which plaintiff must produce in order to survive Cities' motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy. These evidentiary data have not been forthcoming. Even the 'gossamer inference' that existed in 1961 has become attenuated into nothingness as a result of the pretrial record developed during the last four years.
>
> "Plaintiff has been permitted to examine all of those persons, still living, who accompanied Jones to Iran in August, 1952, and who would be able to link Jones' activities at that time with the alleged conspiracy.
>
> "The examinations, however, have done no such thing."
>
> (*Id.*, Tr. Vol. I, 12a-13a)

The Second Circuit unanimously affirmed Judge Herlands' decision, and pointed out that petitioner had "ad-

vanced several divergent theories of his case by which he sought to link Cities Service to the alleged conspiracy." Tr. Vol. III, 175. The Court also noted that petitioner had been granted extensive discovery on several different occasions and on each of the theories which he had asserted. Finally, the Court found that "the record is barren of any facts which would support the existence of a claim against Cities Service," and concluded:

> "Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action." (Tr. Vol. III, 176)

Summary of Argument

The implication that petitioner has been denied general discovery and the right to receive answers from defendants for 11 years is untrue. Its suggestion furnishes no basis for reversal of the unanimous decision below. Petitioner was not denied such discovery. Nor was he denied the right to receive answers.

Rather, he voluntarily transformed an 8-month stay of his right to discovery into one lasting 6 years, and thereafter voluntarily forbore to seek general discovery or to enforce his right to receive answers. Point I *infra*.

The propriety of the granting of summary judgment to Cities Service is clear. On the undisputed documentary record presented below, petitioner had conducted full discovery by deposition and documentary production of every alleged issue of fact he asserted. Every one of those alleged

issues of fact was first demonstrated by defendant Cities and then admitted by petitioner to be non-existent. All that remained of petitioner's case below against Cities was a speculative inquiry—unsupported by a single evidentiary fact. That inquiry—Did Cities conspire?—was answered in the negative by the undisputed documentary evidence and by petitioner's admissions. Point II *infra.*

In the circumstances, it would have been a violation of the summary judgment rule to deny defendant Cities' motion for summary judgment. Point III *infra.*

And it would have been an abuse of discretion to grant petitioner further discovery under Rule 56(f). Point IV *infra.*

POINT I

Petitioner Did Not Have General Discovery or Receive an Answer in 11 Years Because of His Own Deliberate Choice.

Petitioner's brief asserts petitioner "comes to this Court 11 years after the filing of his complaint without having had any *general* discovery and without having received an answer" (Pet. Br. p. 42) (emphasis added).

This is true.

It is true, however, because petitioner:

(a) deliberately stretched defendants' 8-month discovery program—during which petitioner's discovery was stayed—into one that consumed 6 years;

(b) at the conclusion of the discovery program, stipulated that defendants need not answer his complaint;

(c) unnecessarily sought leave to amend the complaint which he had the right to amend as of course;

(d) delayed serving the amended complaint for over a year from the time it was first prepared;

(e) failed to notice a single deposition under Rules 26-37 of the Federal Rules of Civil Procedure for the past 5 years although nothing stopped him from doing so; and

(f) has made absolutely no effort to conduct a general discovery program or even to obtain answers to the amended complaint, which petitioner finally got around to serving in July, 1963, although the record indicates no obstacle to petitioner's securing answers.

In these circumstances, petitioner has no cause for complaint before this Court. He not only was responsible for an 8-month deposition program consuming 6 years, during which period his right to discovery was stayed, but when the stay expired and he was free to proceed, he did absolutely nothing to enforce the rights granted him under the Federal Rules.

Thus, when petitioner says "Rule 12, Fed. R.Civ.P., requiring defendants to answer within 20 days after the service of a summons and complaint, has been forgotten;" (Pet. Br. p. 42) he is in error. The rule was not forgotten. For a number of years after 1962, petitioner remembered it and stipulated again and again and again to extend those 20 days. In the last few years petitioner has allowed the entire case to remain in abeyance and has voluntarily taken no steps to secure answers or conduct discovery.

Certainly, this tolerance by petitioner is not evidence of harsh judicial treatment of petitioner.

Thus, when petitioner states "rules 26 through 37, permitting discovery by 'any party,' have been read to mean discovery by any party except the plaintiff in this action"

(Pet. Br. p. 42), petitioner's assertion is not supported by the record. The stay of such discovery expired on June 1, 1962 (but for petitioner's delays it would have expired in 1957), and petitioner has never made the slightest effort to exercise his rights to obtain such discovery.

Thus, when petitioner asserts "rule 1, which requires that the federal rules 'be construed to secure the just, speedy, and inexpensive determination of every action,' has been ignored" (Pet. Br. p. 42), he seeks to make capital of his own failure to invoke the rules.

These complaints by petitioner, to which we now address ourselves, do not relate to the scope of the discovery which petitioner was granted under Rule 56(f) against Cities Service. That discovery was not *general* discovery (the subject of petitioner's unhappiness), but discovery under Rule 56(f).

That Rule provides:

> "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

It was conceded below that petitioner was not entitled to a Rule 26 type of examination in order to resist the motion for summary judgment, but rather to a more limited one under Rule 56(f). Thus, Judge Herlands stated:

> "I believe, having read the thousands of pages of testimony and exhibits and the briefs in this matter, that

the plaintiff at this point has not presented a sufficient basis to justify the ordinary Rule 26 type of examination.

"Mr. Beshar [petitioner's counsel]: Yes, I can understand if this examination, your Honor, is in response to a motion for summary judgment, and is to enable us simply to assemble enough to satisfy ourselves that we can oppose his motion on the merits, that, therefore, it is not as broad an examination as it would be if we were just taking an ordinary pretrial examination." (Tr. Vol. III, p. 140)

We will demonstrate in Point IV below that, in light of the documentary facts of record and the admissions forced from petitioner, the scope of discovery afforded him under Rule 56(f) was far broader than he was entitled to and that it would have been a gross abuse of discretion to permit further examinations under Rule 56(f).

To the extent, however, that petitioner seeks a reversal of the decisions below on the asserted ground that he has not had an answer and has not had *general* discovery, the argument is specious.

The facts which on first impact seem startling, were deliberately created by petitioner. The lack of general discovery and the absence of answers are the result of a deliberate decision by petitioner to forego the exercise of his rights for two reasons:

First, he had hoped that the Government would proceed with its antitrust case against the other defendants (Cities Service is still not a defendant in that action) so as to provide him with the evidence he would need to make out a case—or possibly a judgment which might obviate any need for evidence as to many of his allegations.

Second, when faced with Cities' motion for summary judgment in 1960, petitioner recognized that he had no claim against Cities Service, that no examination would ever establish a claim against Cities Service, and that his best hope to defeat the motion was to be able to assert in this Court and in the Court below that he had not yet had his discovery.

The argument is a hollow one.

We challenge petitioner to explain why he has endlessly extended the time of defendants to answer, why he still has no answers, and why he has failed to conduct a single deposition as part of the "general discovery" the lack of which he bemoans.

No Court order has produced this result. Petitioner has.

POINT II

There Was No Genuine Issue of Fact to Be Tried in the Court Below.

Petitioner's brief complains at great length concerning the scope of the Rule 56(f) discovery which he was granted.

However, the question of whether the courts below abused their discretion in granting the Rule 56(f) discovery which they did grant, must turn upon the nature of the issues presented on the Rule 56 summary judgment motion.

For Rule 56(f) authorizes discovery in order to resist a pending motion. And in determining the scope of the examination to be afforded under Rule 56(f), the nature of the showing made under Rule 56 on the summary judgment motion and the alleged issues of fact claimed to exist are controlling.

We therefore turn initially to the documentary, uncontradicted record which establishes that petitioner had no claim and has no claim against Cities Service.

The statement of facts in petitioner's brief tells this Court a story which petitioner repeatedly admitted in the courts below was not true. Petitioner makes no effort to withdraw the admission on the basis of which the courts below acted, or to explain them, or even to distort them. He simply ignores them. And he would have this Court ignore them.

When the admissions made below and a few documented facts which are not and cannot be disputed, are added to the petitioner's version of the facts in this Court, the story of possible conspiracy by Cities told in the half-facts found in petitioner's brief metamorphasizes into the truth: that Cities never conspired with the other defendants or anyone as suggested (but never demonstrated) by petitioner.

Indeed, assuming every one of the factual assertions found in petitioner's brief is true for the purpose of this appeal, with the exception of one assertion, which is demonstrably false, there still remains no triable issue of fact and the courts below were clearly correct in granting Cities summary judgment.

The Demonstrably False Assertion

The demonstrably false assertion is the repeated statement ascribing to Mr. Jan Sandberg some position with the Royal Dutch Shell Company, an alleged co-conspirator, and petitioner's conclusion that two conferences between Alton Jones (Chairman of Cities' Board) and Sandberg —one on Jones' way to Iran in August, 1952, and one on his way back in September, 1952—are crucial indicators that Cities was part of the alleged conspiracy.

The assertion is repeatedly made and heavily relied upon by petitioner. Pet. Br. pp. 13, 16-17, 24, 33-34, 36-37, 57.

The Sandberg allegations are a perfect example of petitioner's attempt to contrive a spurious issue of fact to defeat summary judgment when he possesses nothing but exploded suspicions and corrected misinformation.

The Sandberg allegations are demonstrably false and were thoroughly demolished below.

The facts are these:

During the deposition of Mr. Burl S. Watson, then the Chief Executive Officer of Cities, petitioner's counsel, Mr. Beshar, told Mr. Watson and defense counsel *off the record* that he had done research and discovered that Sandberg —a substantial Cities Service stockholder—was a member of the finance committee of Royal Dutch Shell. This colloquy took place at the start of the morning session of the Watson deposition on Thursday, July 30, 1964. Thereafter, shortly after the morning session began, Mr. Beshar asked Mr. Watson the question:

> "Were you aware at the time that Mr. Sandberg was a member of the Finance Committee of Royal Dutch Shell?".

Watson's answer was, "I do not know when I became familiar with his position in Royal Dutch Shell. I know now that he has such a position or that he has had it in recent years. I cannot remember whether I knew it back in 1952 or not." Tr. Vol. II, 425a.

But it is clear that when Watson answered Beshar's question, he was merely accepting Beshar's word as to the role of Sandberg. This is confirmed by the record of Friday, July 31, 1964, where Beshar stated:

> "*I*, through some research, discovered the night before last (Wednesday) that Sandberg was a member of the finance committee of Royal Dutch Shell . . ." [emphasis supplied] Tr. Vol. II, 426a.

Beshar was completely and totally misinformed, and the record is incontrovertible in this regard. The affidavit of Simon H. Rifkind of October 16, 1964, states:

> "I am informed and believe that, in response to inquiries to the "Royal Dutch Shell" group in New York as to Mr. Sandberg's alleged relationship to those companies, Cities Service was advised that he had no such relationship at any time; and specific inquiry to Mr. Sandberg's secretary, who has been with him for many years, as to whether Mr. Sandberg has ever held any position with Royal Dutch Shell, and specifically as to whether he had been an officer, director, member of the Board or on its Financial Committee during the period 1952 through 1954, resulted in a reply, copy of which is annexed hereto as Exhibit A, stating that Mr. Sandberg has never had any such position, and specifically, that he was not an officer, director, member of the Board or Financial Committee in 1952, 1953 or 1954. In addition, I am also informed and believe that a search made by Mr. Connolly and Mr. MacMurray, of the Central Inquiry Office of Standard and Poor's, has revealed that the annual reports of Royal Dutch Petroleum Company and Shell Transport and Trading Company, Ltd. do not list Mr. Sandberg as having had any position or connection with these companies in the years 1952, 1953, 1954 or 1964." Affidavit of Simon H. Rifkind, October 16, 1964, Tr. Vol. II, 451a.

An affidavit from Mr. Sandberg himself, sworn to on October 26, 1964 in Holland, and served on November 4, 1964 stated point-blank:

> "I am not now nor have I ever been a director, officer or member of any corporate committee, or employee of the Royal Dutch Petroleum Company or The Shell Transport and Trading Company or of any of their subsidiaries or affiliates." Affidavit of Jan A. G. Sandberg, October 26, 1964; Tr. Vol. II, 459a.

Sandberg did more than deny any "formal" connection with Shell, contrary to petitioner's implication. Pet. Br. p. 13. He denied—and the publicly available records confirm his denial—that he occupied the position petitioner erroneously attributed to him—and *any* position with Shell.

Petitioner was totally in error in first making his assertion. He is now acting either in total ignorance or in bad faith in raising the issue once more. In their brief of November 4, 1964, in opposition to Cities' summary judgment motion, petitioner's attorneys stated:

> *"We do not understand how we could have been so misinformed about Sandberg's connection with the Royal Dutch Shell Group.* Obviously we cannot be expected to answer on November 4, 1964, an affidavit served on us on November 4, 1964, concerning a gentleman in Amsterdam, but we intend to look into the matter." (Emphasis added) Plaintiff's Reply to Cities Service's Submission in Support of its Motion for Summary Judgment, November 4, 1964, p. 22. Tr. Vol. II, 461a.

The summary judgment motion was not argued until February 9, 1965. Whatever the results of petitioner's research, his counsel never uttered a further word to suggest

that anything Cities or Mr. Sandberg said concerning Mr. Sandberg's nonexistent connection with Royal Dutch Shell was incorrect.

The claim was abandoned below. Hence, there was no occasion for Mr. Watson to explain the source of his misinformation (Pet. Br. p. 13)—an explanation which would only have further embarrassed petitioner's counsel. Since the facts as to the identity of the Board of Directors, officers and Finance Committee of Royal Dutch Shell and its subsidiaries are a matter of public record, the facts, if they existed, were available to petitioner. His failure to supply them, and his abandonment of this point on the final argument below, bars assertion of this alleged fact here.

In fact, there was no connection whatsoever between Sandberg and Royal Dutch Shell and petitioner knows it. This is a perfect example of a spurious and sham issue which petitioner attempted to create below and now tries to revive here.

No Rational Inference of Conspiracy by Cities Can Be Drawn on This Record

We now turn to the petitioner's version of the facts in the context of his admissions and the uncontradicted documentary evidence.

The key concessions made below and disregarded by petitioner in this Court have been referred to above in other connections. They are:

1. On November 4, 1964, after having examined Hill, Watson, Frame, Heston—every living member of the Cities Service Company who, he asserted, had any knowledge on the issues of fact he claimed existed—and after having examined every document relevant to the alleged issues of fact—petitioner solemnly advised District Judge Herlands,

in petitioner's reply to Cities' final submission in support of its motion for summary judgment:

> "Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation, [July 1952] or when he went to Iran, [August 1952] or when he held his Teheran press conference, [September 1952] or when he wrote the conclusions to his final draft report on October 31, 1952." (Plaintiff's Reply to Cities Service's Submission in Support of its motion for Summary Judgment, November 4, 1964, p. 12; Tr. Vol. II, 460a-461a.)

2. On September 15, 1964, in resisting the third renewal of Cities' motion for summary judgment, again after all of the examinations, petitioner's attorney, dealing with the alleged turnabout claim and the Consortium-reward claim, solemnly and under oath advised Judge Herlands:

> "It does not happen to be the fact, however, that Cities lost interest in Iranian oil. Contrary to what plaintiff was told, Jones (President of Cities) continued to take a 'keen interest' in Iranian oil, as Watson, himself, admitted; a special 'Iranian room' was set up at Cities' New York office and put in the charge of a young Iranian woman who looked after the files; and, in fact, Cities watched with resentment when the Iranian pie was ultimately cut up by the seven international majors in a manner characterized by Cities as creating a monopoly for these companies (Pltf's Ex. CS-40)." (Affidavit of Samuel M. Lane, September 15, 1964; Tr. Vol. I, 146a).

These concessions were not lightly or casually given. They were given by petitioner in response to detailed demonstrations based upon undisputed documentary evi-

dence establishing that at each crucial period Cities was not a conspirator. When required to face and deal with these documented facts and the inescapable consequences of those facts, petitioner was forced to give these concessions so as to preserve a semblance of rationality to his claim.

If petitioner is to be permitted at this stage to pretend that the concessions were never given, then the whole process of pretrial discovery and refinement of issues was a waste of Cities' time and money.

To repeat the factual demonstration below which compelled these concessions is, we believe, unnecessary. The admissions and concessions are there, they are part of the record, they have not been repudiated, they have not been explained.

Nor can they be.

These concessions eliminate any conceivable issue of fact.

Thus, in his brief to this Court, petitioner asserts that in 1951 and 1952 Cities was at the mercy of the alleged oil cartel (Pet. Br. p. 8). For the purpose of this motion, we are content to be indifferent to that fact, *because petitioner admits that at that time Cities was not a conspirator.* (p. 54, *supra*).

Petitioner asserts in his brief to this Court that, commencing in 1948 and continuing through 1951, Cities was negotiating with Gulf in order to obtain oil from Kuwait (Pet. Br. p. 9). *But petitioner admits that at these times Cities was not a conspirator* (p. 54, *supra*).

Petitioner asserts in his brief that in June of 1952 petitioner and Cities officials met, and in their discussions Cities officials expressed interest in taking over the Iranian oil industry (Pet. Br. p. 9). *Petitioner admits that at this times Cities was not a conspirator.* (p. 54, *supra*).

In these discussions, according to petitioner's brief, Cities indicated a desire to receive an invitation to go to Iran and discussed compensation to petitioner for securing such an invitation (Pet. Br. p. 10). *Petitioner admits that at this time Cities was not a conspirator.* (p. 54, *supra*).

Petitioner next asserts that he went to Iran and obtained the invitation and delivered it to Cities on July 31, 1952, allegedly as part of some cloak-and-dagger type of masquerade (Pet. Br. p. 9). Whatever the truth may be as to the masquerade story, *petitioner admits that at this time Cities was not a conspirator.* (p. 54, *supra*).

Petitioner asserts that on or about August 8, 1952, Watson prepared a memorandum for Jones suggesting solutions and an approach to the Iranian problem. The document was marked "Secret" and Cities allegedly took various precautions to conceal its activities (Pet. Br. pp. 10-11). Whatever the truth of these assertions may be, *petitioner admits that at this time Cities was not a conspirator.* (p. 54, *supra*).

Petitioner's brief notes that defendant British Petroleum (then Anglo-Iranian) published advertisements in the New York Times and sent registered letters to petitioner and his associates on or about August 6, 1952 (Pet. Br. pp. 11-12). *Petitioner admits that at this time Cities was not a conspirator.* (p. 54, *supra*).

Petitioner asserts that on August 16, 1952 he flew to Iran, and Mr. Jones and his party went to Iran via Amsterdam. There, according to petitioner, Mr. Jones conferred with a Mr. Jan Sandberg—a substantial Cities stockholder. Petitioner asserts to this Court that Sandberg was a member of the Finance Committee of Shell, an alleged co-conspirator (Pet. Br. pp. 12-13), but this allegation is wholly false, as demonstrated above. Petitioner also as-

serts to this Court that the meeting with Sandberg was the first of three meetings with alleged co-conspirators (Pet. Br. pp. 13, 14, 16). Even if the allegation were true, however (which it is not), *petitioner admits that at this time Cities was not a conspirator.* (p. 54, *supra*).

While in Holland, petitioner points out in his brief, Jones sought information on tankers from Watson. He then left for Iran, arriving there on August 25, 1952, and he inspected Iranian facilities (Pet. Br. pp. 13-14). *Petitioner admits that at these times Cities was not a conspirator.* (p. 54, *supra*).

Next, Jones made what petitioner claims to have been a secret trip to Kuwait during his stay in Iran (Pet. Br. p. 14). This is claimed to have been the second meeting with the alleged co-conspirators. Petitioner taxes Cities' counsel because in one argument he erroneously asserted that the trip had not taken place. Indeed, that was counsel's information.

The significance of the furor, however, escapes us, since, again, *at the time of the alleged trip, and thereafter, petitioner admits Cities was not a conspirator* (p. 54, *supra*).

Petitioner next points out that in late September, 1952, Jones requested Watson to advise the Department of State that he, Jones, disassociated himself from a recommendation made by petitioner and his associates that the United States Government purchase Iranian oil. The documents on their face demonstrate the good faith of the head of a substantial oil company, who was in Iran after consultation with the President of the United States, who thereafter reported to the responsible Government officials the results of his trip, who did not want his name used in a scheme of which he disapproved.

But even if there were some question as to the good faith of the communication, it is of no moment in this case because petitioner admitted, after he knew about the communication and had examined thoroughly concerning it, *that at the time Jones was not a conspirator.* (p. 54, *supra*)

Next we come to the alleged turnabout. Below, it was repeatedly asserted that in late September 1952—on or about September 25 or 26—Cities told petitioner that Cities had no further interest in Iranian oil. This was Cities' "sudden turnabout".

The same contention was made in the petition for certiorari (Petition for Cert. p. 7).

That contention has now been abandoned for a second time. For, in our brief in opposition to the grant of certiorari (p. 50), we pointed out that petitioner had himself testified:

> "In view of Mr. Watson's statements [in September, 1952] and the general situation we realized that the—we felt that the thing was in *abeyance.* Mr. Watson said on several occasions they were not interested *now.* Mr. Whetsel kept telling us the situation might open up." (Deposition of Gerald B. Waldron, Tr. Vol. II, 118a) (Emphasis added)

Now petitioner has abandoned the assertion he made in obtaining certiorari, because he now contends:

> "Though Watson had put plaintiff off by telling him that Cities planned to sit and wait, Whetsel revealed to him Cities' continuing interest in Iranian oil by saying that the situation might open up. At his deposition Watson admitted, contrary to what he had told Waldron in September, 1952, that Cities was still interested in getting a concession or a long-term purchase contract in Iran." (Pet. Br., p. 18.)

Whatever the significance of these rather belated and repeated revisions of facts, they can give petitioner no comfort because after full knowledge of these facts *petitioner admitted that Cities was not a co-conspirator at this time and for some time thereafter.* (p. 54, *supra*).

Indeed, after full disclosure of the facts petitioner also admitted to the court below that the alleged turnabout never took place. Ibid.

Next, petitioner points out that Jones stopped off in Amsterdam on his way back to New York and met with Sandberg (Pet. Br. p. 16). This is the third alleged contact with an alleged conspirator. Sandberg, however, was not an agent of an alleged conspirator, as demonstrated above. In any event, in the court below, *with full knowledge of the facts, petitioner admitted that at the time of this alleged meeting Cities was not a conspirator.* (p. 54, *supra*)

Returning to the United States, Jones and his staff prepared a detailed report, the final draft of which was dated October 31, 1952. That report is summarized at length below. It sets forth the reasons why a takeover by Cities of the Iranian oil industry was not feasible. Having read the report, having examined those who prepared it, having viewed all the documents, *petitioner admitted in the court below that at the time this report*—summarizing the reasons why a Cities takeover of the Iranian oil industry was not an appropriate solution to the Iranian problem—*was prepared, Cities was not a conspirator. Ibid.*

Indeed, every alleged fact set forth at pages 4 through 18 of petitioner's brief took place at times when, *petitioner admitted in the court below, after full knowledge of the facts, Cities was not a conspirator.* (p. 54, *supra*)

And the foregoing alleged facts constitute petitioner's case but for a few peripheral assertions.

Thus, according to petitioner, Mr. Jones did not receive a gold medal from the American Petroleum Institute (Pet. Br. p. 18). For the purpose of this motion, we are indifferent to the truth of this allegation. If true, it is not evidence that Cities joined the alleged conspiracy. To the contrary, if true, one would expect that, once Cities joined the alleged conspiracy, as petitioner claims, at least its President would get the gold medal.

He never did.

Petitioner's few remaining assertions are destroyed by the undisputed documentary record which indicates that Cities maintained its nonconspiratorial course of conduct from 1952 through 1955.

Thus, Cities furnished Iran with spare parts for the Abadan refinery in November, 1952, prepared a group of key technicians to help Iranian oil production and submitted plans to the Iranian ambassador in December, 1952. Cities' efforts continued until July, 1953, when the State Department refused to approve the project. See *supra* pp. 31-32.

Indeed, on July 10, 1953, Jones was still writing to Premier Mossadegh making suggestions for solving the Anglo-Iranian oil dispute.

The undisputed record carries Cities' proof of nonconspiratorial behavior even farther.

On Februray 18, 1954, Cities was still opposing the interests of the alleged conspirators by urging the State Department not to approve the Consortium because it fostered monopoly by excluding independent oil companies from significant participation in Iranian oil. In the court below, petitioner conceded this was the case. Tr. Vol. I, 146a.

Petitioner's desperate search for behavior by Cities conforming to the aims of the alleged cartel is illustrated by

his contention that Jones' letters to Secretary of State Dulles and Attorney General Brownell in January, 1953, are evidence of conspiratorial behavior. Petitioner states: "Jones wrote to Secretary of state-designate Dulles stating that 'the only honorable solution' was agreement with the cartel" (Pet. Br. p. 62; see also Pet. Br. p. 19).

Petitioner's contention is transparently false. Jones' letters to Secretary Dulles and Attorney General Brownell enclosed the legal opinion of John W. Davis, Esq. procured by Cities. The opinion declared that Iran had the absolute right to expropriate or nationalize the alleged cartel's property; that American courts would not question the validity of expropriation; and that no recovery could be had by Anglo-Iranian oil companies against a purchaser of oil from Iran. Tr. Vol. II, 396a, 394a-398a. It is simply impossible for petitioner to claim that Cities was conforming its behavior to the alleged conspiracy by such acts—by obtaining and disseminating such an opinion from such a distinguished source.

Petitioner's remaining contentions about Kuwait and Richfield (Pet. Br. pp. 19-21) have been previously discussed. See pages 20-24, 33-40. They are wholly unsupported and were properly rejected below.

Finally, petitioner admitted below that Cities was not a member of the alleged conspiracy when, according to petitioner, the conspiracy's objects were finally achieved in the making of the Consortium. According to petitioner, "Cities watched with resentment when the Iranian pie was ultimately cut up by the seven international majors . . ." (p. 54, *supra*).

In light of these undisputed facts and petitioner's admissions, it is of no moment whether Cities explained to petitioner why it did not take over the Iranian oil industry;

of whether Cities solicited Iran's invitation; or what Jones communicated, and with what motivations, concerning the proposed sale of aviation gasoline to the United States Government in September, 1952.

The same is true concerning Cities' alleged refusal to deal with petitioner in September of 1952. Whatever the motive, petitioner has conceded that, at the time of all of these events,—specifically including the only act he can point to evidencing a termination of relations with petitioner—Cities was *not* a conspirator. And the only possible issue in this case is whether any of this conduct was engaged in pursuant to the alleged conspiracy.

Petitioner has conceded it was not. He should not be permitted in this Court to rely upon inferences from a claimed state of facts which he admitted in the court below was not the true state.

What Is Left of Petitioner's Case?

Petitioner's case against Cities now boils down to a question. Petitioner asked below: "Why, after going so far [had] Cities turned aside?"

The history of this litigation has thus moved from the petitioner's *allegations* in his complaints, to petitioner's admission on his deposition that his case was based on two *conjectures*, to the present stage, where all his conjectures have been totally destroyed, and the petitioner is driven to state his case in the form of a series of *speculative inquiries*. In short, after 11 years nothing remains of petitioner's case against Cities except an inquiry: Why did Cities Service fail to take over the Iranian Oil Industry?

But even the answer to this speculative inquiry is found in the documented record. On October 31, 1952, Mr. Jones completed a proposed report to Premier Mossadegh out-

lining the problems and the proposed solutions relating to reactivating the Iranian oil industry.

Assuming, although it has not been proved, that Cities had the opportunity to take over the entire Iranian oil industry, as petitioner asserts, the reasons why it did not do so are clearly set forth—in a contemporaneous document, whose authenticity is unchallenged, prepared at a time when petitioner admits Cities was not a conspirator.

That document states *inter alia:*

"MAINTENANCE AND REPAIR MATERIAL

* * *

The problem of securing replacement and repair parts for this British-manufactured equipment from other than the British manufacturer is almost impossible of solution. An investigation has been made as to the possibilities of obtaining spare parts for the British-manufactured equipment from American manufacturers. The specific parts investigated were those included in lists obtained from Abadan during the visit to Iran. This study has shown conclusively that in the great majority of cases it would be practically impossible for American manufacturers to supply such equipment due to lack of detailed fabrication drawings, as well as to the fact that the fabricating of small quantities of special orders becomes prohibitively expensive."

(Report on Iranian Petroleum Situation, October 31, 1952, p. 7; Tr. Vol. II 6a-7a).

"It is extremely doubtful if the Abadan refinery could operate at maximum capacity, or even close thereto, for more than a very few months unless a workable mechanism is devised for the securing of

repair and replacement parts for the British-manufactured refinery equipment."

(*Id.* p. 8; Tr. Vol. II 8a).

"*Automotive Facilities*

The problem of maintaining adequate automotive transportation facilities is one of the most serious problems facing the National Iranian Oil Company at present. This is true, first, because all petroleum operations are dependent upon automotive facilities for the movement of men and materials, and secondly, even with the limited scale of today's operations, the automotive transportation facilities are being operated almost at their original capacity since the number of employees of N.I.O.C. is but little changed from what it was prior to nationalization. Since early in 1951 no new automotive equipment has been obtained by the N.I.O.C. and only a very limited amount of repair parts for the existing equipment. It was quite apparent from an observation of the various types of automotive equipment now in use that unless extensive replacements are soon secured there will be a serious collapse in the automotive transportation system." (*Id.* p. 17; Tr. Vol. II 17a).

• • •

"There are three major considerations to be resolved if the petroleum industry in Iran is to be reactivated:

"*First,* obtaining sufficient tankers, markets and marketing facilities to secure outlets for Iranian petroleum products and crude oil.

"*Second,* obtaining necessary skilled petroleum technologists and operators to supplement the present

Iranian staff for the operation of the petroleum facilities.

"*Third,* obtaining the necessary replacement and repair material to permit the operation of the existing petroleum equipment, a large proportion of which is of British manufacture.

"It is proposed to discuss the first consideration in some detail in this summary section since it is the most difficult of solution." (*Id.* p. 25; Tr. Vol. II, 25a).

* * *

"The possibility of exporting any substantial quantity of petroleum products from Iran to the Western Hemisphere in the foreseeable future would appear to be almost negligible. This is particularly true because the Abadan refinery in contradistinction to Iranian oil production is not a low-cost producer.

"The labor costs at the Abadan refinery, despite comparatively low wage rates, are from five to seven times greater than for comparable U. S. refineries, and the yield of high value products, such as gasoline, is much lower than invariably obtained by U. S. refineries. It would seem to be completely unrealistic to assume that any reactivation of the Iranian refining industry could be achieved in the foreseeable future through the exportation of refined products from Abadan to the Western Hemisphere." (*Id.* at p. 28; Tr. Vol. II, 28a.)

"A correlary part of securing outlets for Iranian petroleum is the problem of securing sufficient tankers for the movement of this oil. It is estimated that to move as much oil from Iran as was moved in 1950 to Eastern Hemisphere markets would require about 400 tankers, aggregating about 5,000,000 deadweight

tons. Table II in the appendix shows the latest available listing of the worldwide tankage fleet by countries and by tonnage. As of the present time practically all these tankers are in operation and it is probable that this tight tanker situation will continue for the next two years. While it is true that a certain number of tankers can almost always be obtained on a charter basis, it is highly improbable that anything like 5,000,000 tons of tanker capacity could be obtained to move Iranian petroleum without drawing on at least part of the fleet which, prior to nationalization, moved Iranian oil into world markets [the Anglo-Iranian fleet]. The construction of a new fleet of tankers for this purpose is possible, but it would be exceedingly expensive (possibly $800,000,000) and would require as much as five years to complete.

"Summarizing, the following reflects the views of Mr. Jones and his associates on this phase of the report:

"1. Complete reactivation of the Iranian petroleum industry in any reasonably short time will require that some arrangement be consummated through which a substantial portion of the marketing and transportation facilities utilized for Iranian oil prior to nationalization [both British] will be restored to this service.

"2. There will be little, if any, demand in the Western Hemisphere for refined products from Abadan.

"3. For the immediate foreseeable future, Abadan refinery operations cannot be increased beyond the amount needed to take care of internal Iranian demands and such markets as can be developed in Europe, Asia and Africa." (*Id.* at pp. 29-30; Tr. Vol. II, 29a-30a.)

• • •

"This fact must be recognized by all parties concerned; that the full reactivation of the Iranian oil industry within a period of five years or less can only be obtained by the consummation of some agreement between the Iranians and the British whereby the markets and the transportation and marketing facilities previously being served by and handling Iranian petroleum are returned to that service. Therefore, the development of a mutually satisfactory agreement between the Iranians and the British is the fundamental point governing the full reactivation of the oil industry of Iran." (*Id.* at p. 35; Tr. Vol. II, 35a-36a).

It is conceded that the idea of such an agreement would not then even be entertained by the Iranians.

Petitioner's description of the report of October 31, 1952 (Pet. Br. p. 17) is an incredible distortion. The report again and again makes clear that an essential pre-condition of a settlement is cooperation with the British in order to get tankers and markets. The suggestion that National Iranian Oil Company " . . . endeavor to enter into a long term agreement" with an American oil company was clearly a last and least desirable alternative in light of the pressing financial problems faced by the Iranians. Thus, the report states:

"It would appear that the restoration of the Iranian economy will require the continued operation of the Abadan refinery and, consequently, the export problem is primarily one of exporting petroleum products rather than crude oil. The possibility of exporting any substantial quantity of petroleum products from Iran to the Western Hemisphere in the foreseeable future would appear to be almost negligible.

* * *

"Since it does not appear that the exportation of either crude oil or refined products from Iran to the Western Hemisphere offers any real hope of substantially reactivating the Iranian petroleum industry, it is obvious that such reactivation will depend upon regaining those markets in the Eastern Hemisphere which were served from Iran prior to nationalization. . . ." Tr. Vol. II, 28a-29a.

See, also, Tr. Vol. II, 31a ff.

The solution to Iran's problems required substantial reactivation of the entire Iranian oil industry.

The alternative of an agreement with an American oil company was clearly a last-ditch one, to be considered only if everything else failed. It was specifically stated in the very report to be an alternative which would involve purchases of " * * * very small quantities for the immediate future". Tr. Vol. II, 37a. The report is clear that Jones did not recommend this last-ditch alternative or regard it as a solution to Iran's problems.

The report was a thorough, careful, statesmanlike review of a complex problem—not an artful cover for conspiratorial action.

And petitioner admits this. He does not claim that it is a sham. *He admits that its authors were not conspirators when they recorded these studied conclusions.* (p. 54, *supra*).

If petitioner were not so obsessed with his search for the slightest evidence of evil-doing by Cities, he would accept this admittedly nonconspiratorial summary for what it was —an honest answer to his persistent question, "Why didn't Cities do it?"

Petitioner has thus not produced any specific facts showing that there is a genuine issue for trial. Instead, he has

relied upon a speculative inquiry, in the absence of any evidence substantiating any of his previously demolished guesses. He asks "did Cities conspire"?—the ultimate conclusory question—in the face of an undisputed record which compels the conclusion that Cities never engaged in the conspiracy petitioner alleges.

Such a speculative question is totally insufficient to defeat a motion for summary judgment. There can be no doubt concerning the meaning of Rule 56(e) which states:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him."

POINT III

Summary Judgment Was Properly Granted.

For many years the Second Circuit had followed a restrictive policy which differed from that of other circuits when dealing with the summary judgment rule. See, *e.g.*, *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946).

As a result of *Arnstein*, courts in the Second Circuit have tended more and more to search for issues of credibility and minor issues of fact, rather than attempting to determine whether on the documentary evidence, plaintiff or defendant simply had no case. The result has been severely to restrict the utility of the summary judgment remedy.

This tendency was recently reversed, or at least arrested, in the Second Circuit in cases such as *Dressler* v. *M. V.*

Sandpiper, 331 F.2d 130 (2d Cir. 1964); *Scolnick* v. *Lefkowitz,* 329 F.2d 716 (2d Cir. 1964); *Schwartz* v. *Associated Musicians of Greater New York, Local 802,* 340 F.2d 228 (2d Cir. 1964).

We submit that the direction which the Second Circuit is taking is correct and brings it into closer conformity with the views of other circuits and other jurisdictions concerning the proper scope of the summary judgment rule. It would, in our view, be a disservice to the principles embodied in the Federal Rules to take any action which would lead to a retrogressive construction of Rule 56.

Moreover, there is nothing unique in applying the summary judgment rule to antitrust cases. Rule 56 has previously been applied to antitrust cases, and its application approved by this Court as long ago as 1947. In *International Salt Co.* v. *United States,* 332 U.S. 392 (1947), summary judgment was affirmed by this Court where the documents clearly established that an antitrust violation had occurred. Similarly, in the case at bar, the fact of non-conspiracy is established by documentary evidence.

A. *The Record Reveals No Genuine Issue of Fact to Be Tried*

An issue of fact normally consists of two contradictory assertions about a matter of fact. Each of the matters of fact asserted by petitioner—Kuwait, Constortium, Turnabout, etc.—have been demonstrated by documentary evidence and petitioner's own admissions to have been spurious and sham. There remains solely petitioner's question—not assertion—"Did Cities Service conspire?"

This question does not create a triable issue of fact. Indeed, even if petitioner had more confidence and were to assert as a proposition of fact "Cities Service did conspire" it would be insufficient on this record to create a genuine, triable issue. Federal courts have repeatedly so held, even

before the amendment of Rule 56(e). Thus, in *Bond Distributing Co.* v. *Carling Brewing Co.*, 32 F.R.D. 409 (D.Md. 1963), *aff'd*, 325 F.2d 158 (4th Cir.), plaintiff claimed that defendant Carling had conspired with Canadian Breweries Ltd. and others to monopolize the brewing industry, and in furtherance of that conspiracy had terminated independent distributorships. The District Court granted summary judgment for defendants, which was affirmed on appeal.

The Court stated that plaintiffs had not:

> ". . . been able to point to any fact tending to prove that Bond's distributorship was terminated as a result of any conspiracy . . . Carling has filed in support of its motion for summary judgment, affidavits which show that Bond's distributorship was terminated because Carling was not satisfied with Bond's performance, and plaintiffs have offered nothing to contradict that evidence except the bare allegations in Count 4 [conspiracy count] of their complaint. That is not enough." 32 F. R. D. at 414.

In denying plaintiff's motion for further discovery and examination regarding all activities of one E. P. Taylor with respect to Canadian Breweries Ltd., the Court said:

> "Plaintiffs have utterly failed to support their original claim by any document, deposition or affidavit. Their belated effort to rely on a broader claim would not justify the Court, in permitting the proposed fishing expedition in view of the fact that, although plaintiffs have already had the benefit of (1) the entire record in the Canadian case, (2) other documents and (3) depositions, as well as (4) full answers by Taylor and Dowie to interrogatories, they are unable to point to any evidence tending to prove a conspiracy . . ." 32 F. R. D. at 414-415.

On appeal, the Fourth Circuit held that the District Court had properly granted summary judgment on the conspiracy count and had not abused its discretion in denying further discovery. 325 F. 2d at 159.

Similarly, the Third Circuit affirmed summary judgment for defendants in *Fiumara* v. *Texaco, Inc.*, 204 F. Supp. 544 (E.D. Pa. 1962), *aff'd* 310 F.2d 737 (3d Cir.) *cert. denied*, 372 U.S. 976. The District Court noted plaintiff had failed to present facts supporting the conspiracy inference which he wanted the court to draw:

> "Facts cannot be based on sheer speculation, rather than on the drawing of a logical inference. Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. (1961) [*cert. denied* 366 U.S. 930]. The vague, conclusory allegations of the Amended Complaint, when considered with the documents filed by defendants, are insufficient to create a genuine dispute concerning a material fact and, hence, do not prevent the granting of defendants' Motion For Summary Judgment." 204 F. Supp. at 554.

See also *Gold Fuel Service, Inc.* v. *Esso Standard Oil*, 195 F. Supp. 85 (D. N. J. 1961), *aff'd* 306 F.2d 61 (3rd Cir. 1962, *cert. denied* 371 U.S. 951 (1963); *United States* v. *Johns-Manville Corporation*, 245 F. Supp. 74, 79-80 (E.D. Pa. 1965) and cases cited therein; *Hoffman* v. *Herdman's Ltd.*, 41 F.R.D. 275 (S.D.N.Y. 1966); *Scolnick* v. *Lefkowitz*, 329 F.2d 716 (2nd Cir. 1964); *Miles* v. *Dickson*, 40 F.R.D. 386 (D. Ala. 1966).

The rule of these cases has been fortified by the amendment of Rule 56(e), which is discussed in detail below in response to petitioner's argument—which was not made in the courts below—asserting that the burden of proof was improperly shifted to petitioner.

B. *None of the Assertions Made by Petitioner in This Court Demonstrate the Existence of Any Triable Issue of Fact*

(i) *Cities Has Denied Every Allegation of Wrongdoing*

Petitioner claims that Cities never denied participation in the alleged conspiracy and that this must lead to reversal of summary judgment (Pet. Br. pp. 41, 51). This contention was made for the first time in this Court. It was not raised below.

This claim ignores the entire record in this case.

Cities has denied every allegation that petitioner has made charging Cities with wrongdoing.

Thus, in his complaint of June 11, 1956, petitioner alleged that co-defendants:

> "Gulf and Anglo-Iranian, during late August or early September, 1952, conspired to and did offer Cities Service and Cities Service did accept a vast long term supply of Kuwait oil at a price far below the posted International Gulf of Persia price . . . *At this time and by these acts Cities Service,* without knowledge of plaintiff, *entered into combination and conspiracy with the other defendants* and in furtherance of defendants' scheme broke off further negotiations with plaintiff and the National Iranian Oil Company and refused to enter into any contract or arrangement with reference to Iranian petroleum. As a further consequence of this conspiracy Cities Service eventually gained a participation in the Consortium Agreements relating to Iranian oil hereinafter described." (Complaint, June 11, 1956, ¶10(i)(6), Tr. Vol. II, 60a-61a) (Emphasis added).

In its summary judgment affidavits and exhibits Cities not only denied each of these allegations but established

they were false. (Affidavit of George H. Hill, Jr., April 8, 1960, and Exhibits 2-59 in support of Cities' motion for summary judgment April 8, 1960; Tr. Vol. II, 146a-370a; see also pp. 19-21; 30-33; 35-38, *supra.*) Moreover, Cities' affidavits and supporting papers repeatedly asserted that the "documented record of uncontroverted and incontrovertible facts . . . demonstate[s] that Cities Service was not a conspirator at any time." See, *e.g.*, Affidavit of Simon H. Rifkind, October 16, 1964; Tr. Vol. II, 432a. Cities also disproved the conspiracy allegation by destroying each and every one of petitioner's factual assertions on the basis of which he sought to draw an inference of conspiracy.

Petitioner never asked any of the four leading Cities officials whom he deposed for fifteen days whether Cities had entered the conspiracy. If he had been so concerned about a formal denial of the conclusory allegation of conspiracy, all petitioner needed to do was to pose a single question. Petitioner did not ask this question because Cities had already denied and disproved the conspiracy allegations in its summary judgment papers.

What petitioner seemingly is concerned with is the absence of a formal pleading denying the formal allegations. But the reason for the absence of such a paper is that defendants were granted an extension of time by Judge Weinfeld until thirty days after petitioner's deposition was completed, within which to answer the complaint. Tr. Vol. IV, 270; R. 11045-11048.

After Cities had completed its 3½ day examination of plaintiff, and while the time was thus extended, it moved for summary judgment.

Petitioner filed an amended complaint on June 28, 1963, at a time when Cities' summary judgment motion directed to his initial complaint was *sub judice.*

The reason why Cities never answered the allegations of the amended complaint was that petitioner *stipulated* in writing on July 29, 1963 that Cities need *not* answer until thirty days after the determination of Cities' summary judgment motion. Tr. Vol. IV, 263-264. Since Cities' motion was granted, Cities was never required to answer the amended complaint.

Finally, petitioner's assertion that "no mention was made by the [district] court of the fact that Cities had never, by affidavit or pleading, denied that it had conspired against plaintiff" is doubly misleading. Pet. Br. pp. 53-54.

Not only did Cities deny all of petitioner's charges of wrongdoing, but petitioner himself never raised this alleged failure to deny before the District Court or the Second Circuit.

That, of course, explains why the lower courts did not mention this.

(ii) ***The Absence of Testimony by W. Alton Jones Raises No Inference of Conspiracy: Those Who Did Testify Were Not Underlings***

Petitioner argues that Cities did not produce its President, W. Alton Jones, for examination and that this leads to the "natural inference that [they were] afraid of what the evidence will show," and was "evidence of the most convincing character of the existence of conspiracy." Pet. Br. pp. 56-57, 61.

The facts are these: W. Alton Jones died in an airplane crash on March 1, 1962. Mr. Jones died before petitioner began discovery of Cities under Rule 56(f). Had petitioner not stretched eight months of deposition into six years, he could have examined Mr. Jones before his death. Indeed, because of his dilatory conduct, petitioner did not begin

deposing Hill of Cities Service until October 1962. By then Mr. Jones was dead. On these facts, there is no more basis for petitioner's argument that an inference should be drawn against Cities by reason of its "failure to call Jones" than there would be to draw such an inference against petitioner. Pet. Br. p. 61.

Petitioner also cites *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939) implying that the Cities' officials he deposed were "at a secondary level unfamiliar with the facts." Pet. Br. 56, 61. This argument is untenable. Petitioner deposed the highest Cities executives, who had direct knowledge concerning the allegations he made. Petitioner first deposed George H. Hill, Jr. then Cities' Senior Vice President in charge of Foreign Operations. Hill was the Cities official most familiar with the Kuwait oil contract and the Consortium—the only allegations made by petitioner in his original complaint against Cities. Moreover, it was Hill's affidavit that formed the basis for Cities' motion for summary judgment.

Petitioner later complained that Hill's testimony did not bear on his charge that Cities suffered an alleged change of heart. Pet. Br. pp. 27-29. But that theory was not pleaded by petitioner until after the Hill examination. Indeed, it was not until over a year after Jones had died, that petitioner invented the turnabout or change-of-heart theory and amended his complaint.

In any event, after petitioner invented his new theory, he deposed Burl S. Watson, the President and Chief Executive of Cities, for five days.

Surely Watson was no underling. Petitioner had long maintained that Watson was, with Jones, the crucial witness in this case. See, *e.g.*, Tr. Vol. III, 142. Watson was familiar with all aspects of the Iranian oil transactions

and had been second in command to Jones in 1952. Watson's examination thoroughly refuted the charge that Cities dramatically changed its position.

Petitioner further deposed J. Edgar Heston, Cities' Manager of oil production who had accompanied Jones on his Iranian trips, and Alfred P. Frame, Cities' First Vice President, who was fully familiar with the activities of Cities in Iran and who also took part in the Iranian trips with Jones.

In brief, petitioner examined top level Cities officials who were fully familiar with the facts relevant to petitioner's charges.

It was not until after Jones' death that petitioner claims to have discovered "crucial" facts as to Jones' "change of heart." He now asserts that Jones' post mortem failure to testify concerning these allegations supports a conspiracy inference. Pet. Br. pp. 33-34.

C. *The Authorities Relied Upon by Petitioner Below Were Properly Rejected Below*

Petitioner relied below primarily on *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). He cites this decision again before this Court. Pet. Br. pp. 43, 46, 61-62. He also cites a line of anti-trust cases concerning "conscious parallelism," including the *Interstate Circuit* and *Theatre Enterprise* cases. Pet. Br. pp. 61-64. These cases are inapposite.

In *Poller*, this Court reversed a summary judgment for the defendants in a case involving a claim that the defendants conspired to eliminate plaintiff from Milwaukee broadcasting by purchasing his competitor station and cancelling his network affiliation. The Court held that on the record presented there was an issue of fact as to

whether the defendants' actions were the result of conspiracy or independent business judgment, and hence summary judgment was improper.

Petitioner asserts that Cities' position is the same as the defendants' position in *Poller* in that this case, like *Poller,* turns on the issue of motive and intent.

Petitioner is wrong. He can only maintain his contention by ignoring the documented, uncontroverted record established during the past nine and a half years.

There is no issue of motive or intent left in this case. For, petitioner's whole case is grounded on the now-demolished and now-abandoned assertion that Cities, acting as a conspirator, had a change of heart concerning Iranian oil, dropped all interest, and pursuant to the conspiracy terminated its relation with the petitioner. Petitioner can no longer make this assertion because he admitted below:

> "It does not happen to be the fact, however, that Cities lost interest in Iranian oil." (Affidavit of Samuel M. Lane, September 15, 1964; R. 11945; Tr. Vol. I, 146a.)

Accordingly, there is no genuine issue of purpose or intent to be decided in the case at bar, since the act whose purpose was alleged to have been conspiratorial—the "break-off" in advantageous negotiations with the Iranians—has, in fact, been demonstrated never to have occurred, and has been admitted by the petitioner never to have occurred. It is apparent that if the defendants in *Poller* had convincing documentary evidence and plaintiff's own admission that no loss of affiliation and no purchase of a competitor had taken place, there would then have been absolutely no issue of purpose or intent left to be decided.

Nor is that all. Petitioner's reliance on *Poller* further ignores the most basic distinction of all—that petitioner

conceded that Cities was not a conspirator at the time he asserted that Cities terminated its relation with him.

Petitioner's claims—that by September, 1952 "something had happened which turned Jones against Waldron . . . something which we mean to get at" (Pet. 2d Cir. Br. p. 36), and that when Waldron returned to the United States in *September, 1952,* he was told that Cities had no interest in Iranian oil—thus become meaningless, and, even worse, irrelevant. For these acts, critical under petitioner's speculations, took place at a time when petitioner concedes Cities was not a member of, nor acting pursuant to, any conspiracy.

The facts in the *Poller* case are not even close. In order to be a parallel situation, the plaintiff in *Poller* would have had to have conceded that CBS was not acting as a conspirator when it bought the Milwaukee station, and when it cancelled plaintiff's network affiliation. Petitioner in our case has admitted that Cities was not a conspirator when it made the business judgment whose motive petitioner questions.

Nor are these concessions and admissions the only features that distinguish this case from the *Poller* case. Rule 56(e) demands that the court pierce the pleadings to ascertain whether there are genuine issues of fact; it forces the plaintiff to produce specific facts indicating a genuine material issue. And, quite apart from the absence of the admission-of-petitioner factor, this Court in *Poller* found that "the affidavits, depositions, and exhibits indicate much more than the free exercise by CBS of the granted right of cancellation." 368 U.S. at 469. In the case at bar, however, petitioner not only cannot demonstrate that Cities did anything more than lose interest in a business venture, he now admits that the loss of interest never took place.

The conscious parallelism or "conforming behavior" cases are distinguishable on the same ground as *Poller*. There can hardly be conscious parallelism where petitioner has not established any behavior by Cities which parallels that of the alleged conspiracy. The undisputed record not only is devoid of evidence of conforming behavior but demonstrates that Cities' course of conduct consistently opposed the alleged cartel (see pages 30-33; 35-38).

Even if parallel behavior by Cities had been demonstrated, petitioner's opposition to summary judgment must still be judged insufficient. Something besides mere parallelism must be provided to create an inference of conspiracy:

> "[t]he point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way." Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962). See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-541 (1954).

In the case at bar, not only are such other facts missing, but petitioner has conceded that Cities was not a conspirator at all crucial times. Tr. Vol. II, 461a; Tr. Vol. I, 146a. See pages 53 to 60 above.

Accordingly, neither *Poller* nor the conforming behavior antitrust cases cited by petitioner bear on the present action.

D. *Petitioner's Arguments to This Court, Which Were Not Made Below, Are Equally Untenable*

(i) *Petitioner's "Shifting of Burden" Argument Is Fictitious*

For the first time before this Court petitioner contends that the District Court and the Court of Appeals misapplied the summary judgment procedures under Rule 56 of the Federal Rules of Civil Procedure by "relieving Cities of the burden of demonstrating the absence of a genuine issue of fact on its motion for summary judgment and imposing the converse burden on plaintiff." Pet. Br. Point II, pp. 50-57.

Petitioner is fighting a strawman which he has created. It is most unlikely that the Second Circuit, which has consistently applied the most restrictive approach toward summary judgment motions, could have removed the burden of proof from the movant on a summary judgment motion, and shifted this burden to the opponent of such a motion.

And, of course, no such thing took place. Indeed, both courts below found that Cities had demonstrated that there were no triable issues of fact on the basis of Waldron's deposition, his concessions and admissions below, Cities' affidavits and the undisputed documents from Cities' files.

The claim that the District Court and the Court of Appeals revolutionized the summary judgment procedures of Rule 56 (and that their opinions thus conflict with those of every other court, Pet. Br. pp. 50-51, 55-56) is not supported or supportable by the record.

Certainly none of the opinions suggested that the burden was shifted. And to make the argument, petitioner must close his eyes (and ask this Court to close its eyes) to the

multitude of exhibits submitted to the Court below by Cities.

Indeed, since petitioner nowhere in its brief cites a single document submitted by Cities, his version of the case suggests that all Cities did was serve a naked notice of motion for summary judgment and that the courts below then turned to petitioner and required him to produce specific facts to oppose this unsupported notice.

Nothing could be further from the truth. The 461-page appendix submitted by Cities below (which is included as Volume II of the record here) represents only part of the materials produced by Cities in support of its summary judgment motion. Those documents, and excerpts from Waldron's own deposition, and Waldron's admissions were the basis upon which Cities moved for summary judgment.

And, contrary to petitioner's assertion, the District Court, far from relieving Cities of its burden, placed an unusually heavy burden upon it before it would grant summary judgment. The District Court made its position unmistakably clear:

> "THE COURT [questioning Cities' counsel on the argument of Cities' summary judgment motion]:
>
> "You claim you have gone forward and, as the movant under Rule 56 have sustained the burden in effect of eliminating every rational hypothesis of guilt?
>
> "MR. RIFKIND: Let me demonstrate that.
>
> "THE COURT: Is that what you have done?
>
> "MR. RIFKIND: Yes. I say—
>
> "THE COURT: And stated in traditional legal jargon, what you have undertaken to do is to eliminate by documentary and other record facts every rational, reasonable hypothesis of conspiracy.

"MR. RIFKIND: You have done it exactly as I would hope to be able to say it.

"THE COURT: That is what you have demonstrated?

"MR. RIFKIND: That is right."

Tr. Vol. III, 97-98.

The burden thus placed on Cities by the District Court, that of "eliminating every rational hypothesis of guilt . . . [and] of conspiracy" may have been heavier than Rule 56 requires. It certainly was no less than Rule 56 requires. It certainly shifted no burden to petitioner. Under this standard, Cities was forced to disprove hypotheses of conspiracy which even petitioner had not suggested or supported. In granting summary judgment, the District Court found that Cities had successfully carried this heavy burden.

In light of the restrictive standard expressly applied by the District Court, petitioner's contention that Cities was relieved of its burden as the movant under Rule 56 and that such burden was shifted to petitioner is untenable.

(ii) ***The Lower Courts Did Not Misconstrue Rule 56(e)***

Petitioner also maintains that the lower courts erred in their construction of the recent amendment to Rule 56(e) by "shifting the burden to petitioner." Pet. Br. pp. 54, 52-56.

Rule 56(e) was amended in 1963 by the addition of the following language:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 56(e) was specifically amended in order to change the restrictive interpretations placed on that Rule by the Third and Second Circuits. Wright, Rule 56(e): A Case Study on the Need for Amending the Federal Rules, 69 Harvard Law Rev. 839, 856 (1956); *Doehler Metal Furniture Co.* v. *United States*, 149 F.2d 130, 135 (2d Cir. 1945); *Vermont Structural Slate Co.* v. *Tatko Bros. Slate Co.*, 134 F. Supp. 4, 5 (N.D. N.Y., 1955); *aff'd*, 233 F.2d 9 (2d Cir. 1956), *cert. denied* 352 U.S. 917.

The Advisory Committee on Rules noted that the provisions added to Rule 56(e) were intended

> "to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well-pleaded,' and not supposititious, conclusory or ultimate. [citations omitted].
>
> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6

Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

"It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

"The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary." 6 *Moore's Federal Practice* ¶ 56.01[14] pp. 2021-2022 (2d ed. 1965).

Not only was the amendment aimed at the Third Circuit doctrine, but at cases in the Second Circuit as well. As the Court of Appeals for the Second Circuit noted:

"In this Circuit, for example, numerous decisions seemed to reflect a great reluctance to find that no genuine issue of fact remained for trial, and we have reversed and remanded a long line of cases in which summary judgment had been awarded below. [citing *Arnstein* v. *Porter,* 154 F.2d 464 (2d Cir. 1946) and *Kern* v. *Hettinger,* 303 F.2d 333 (2d Cir. 1962)] . . . As explained by the Advisory Committee, the recent amendments to Rule 56 were designed to overcome just such cases, which, in the words of the committee, have 'impaired the utility of the summary judgment device.'" *Dressler* v. *MV Sandpiper,* 331 F.2d 130, 132 (2d Cir. 1964).

The Advisors' comments seemed to Cities directly in point upon Cities' 1963 renewal of its motion for summary judgment and were relied upon by Cities at that time. After extensive discovery, petitioner had produced no specific facts to controvert Cities' proof that it never joined

the alleged conspiracy. Instead, he relied on the conclusory question, "Did Cities conspire?", as though that unfounded query could defeat summary judgment.

Nevertheless Judge Herlands provided petitioner with another opportunity to gather specific facts to oppose Cities' overwhelming demonstration that there was no genuine issue of fact remaining in this case. (Opinion, June 23, 1964; Tr. Vol. I, 56a-58a.)

Finally, after petitioner had completed his examination of Cities officials with regard to every issue he had raised at any time—Kuwait, Consortium, change of position, and Richfield—petitioner still could not produce any specific facts to controvert the overwhelming case established upon Cities' summary motion.

At this point, the District Court considered the policies "favoring private antitrust actions" and "protecting a plaintiff's right to his day in court" as well as the countervailing policy "against the undue harassment of a litigant through a spurious law suit." Opinion, September 8, 1965, Tr. Vol. I, 16a. Finding that Cities' overwhelming demonstration had not been refuted by the production of any facts by petitioner, despite extensive discovery, the Court finally granted Cities' motion which had been pending for five years.

The Court thus strictly, albeit correctly, construed Rule 56. Cities carried the burden of establishing the absence of genuine factual issues based upon documentary evidence proving that Cities was not a participant in any conspiracy, that the allegations in petitioner's complaint were false, and that Cities' course of conduct consistently opposed the interests of the alleged conspiracy.

Once Cities had completed this demonstration nothing could stand in the way of summary judgment unless peti-

tioner came forward with evidence tending to contradict or refute Cities' proof.

In charging that the courts below erred by shifting the burden of proof, petitioner reflects his misunderstanding of these basic propositions. Professor Kaplan dispelled such misunderstandings concerning Rule 56(e):

> "A party opposing summary judgment need not come forward in any way if the moving party has not supported his motion to the point of showing that the issue is sham. The amendment introduces no change here. [*However*] . . . *when the moving party has freshly demonstrated that his adversary's past assertions are unsupported, the adversary may be concluded if he does nothing more.*" Kaplan, Amendments of the Federal Rules of Civil Procedure, 77 Harv. L. Rev. 801, 827 (1964). (emphasis added)

Cities had demonstrated that petitioner's assertions created sham issues and were unsupported. Petitioner was then forced to do something more in order to avoid judgment in favor of Cities. Despite 5 years of adjournments of Cities' motion by the Court, during which petitioner conducted extensive discovery, he was unable to produce any facts supporting his conclusory assertions or refuting Cities' case. Summary judgment against him was properly entered at this juncture.

Petitioner quotes one sentence of Judge Herlands' District Court opinion out of context to leave the impression that petitioner had been forced to assume a burden of proof not intended by Rule 56. (Pet. Br., p. 54):

> "The crucial facts which plaintiff must produce in order to survive Cities' motion for summary judgment are evidentiary data tending to prove that Cities be-

came a party to the alleged conspiracy. These evidentiary data have not been forthcoming." Opinion, September 8, 1965, Tr. Vol. I, 12(a).

Petitioner neglects to mention the preceding paragraphs of Judge Herlands' opinion in which he carefully considered petitioner's claims purporting to link Cities with the alleged conspiracy. Tr. Vol. I, 10a-11a. As to petitioner's initial claims concerning the Kuwait oil contract and the Consortium, Judge Herlands found that:

> ". . . the record, as it now stands, conclusively establishes that both the Kuwait contract and participation in the consortium had no connection whatever with the course of Cities' conduct with regard to Iranian oil." Tr. Vol. I, 12a.

As to petitioner's major premise that Cities did a complete turnabout with respect to interest in Iranian oil, the District Court found that the evidence presented "demonstrates a consistent course of conduct by Cities with regard to Iranian oil at all times." Tr. Vol. I, 12a.

It was after these findings by the District Court—that Cities had met its burden under Rule 56 by totally destroying each and every claim by petitioner—that the District Court stated that petitioner must produce "evidentiary data tending to prove that Cities became a party to the alleged conspiracy" or else Cities was entitled to judgment. This was a perfectly proper application of standard summary judgment procedures.

The lower courts' application of Rule 56(e) in no way differs from its application by other courts. In *United States* v. *Mount Vernon Milling Co.*, 345 F.2d 404 (7th Cir. 1965), plaintiff claimed damage to a quantity of corn meal was caused by defendant. An affidavit submitted by

defendant's expert witness showed that the formation of the fungus which damaged the corn meal was totally unrelated to any misfeasance committed by defendant. The court found:

> "At this point in the proceedings, something more was required of the plaintiff beyond bare allegations and conclusions of its complaint to show the existence of an issue as to a material fact to prevent grant of a motion for summary judgment. . . . Contentions dispositive of the case were not in dispute." 345 F.2d at 405-406.

In *Miles* v. *Dickson,* 40 F.R.D. 386 (M.D. Ala. 1966), defendants filed overwhelming evidence in support of summary judgment. The Court held:

> "it became incumbent on the plaintiffs to present material facts showing that there was a genuine issue for trial. Even though counsel for plaintiffs have interrogated by deposition not only the defendants but the plaintiffs as well, they have produced no evidence that raises a genuine issue within the meaning of Rule 56." 40 F.R.D. at 389.

In *Hoffman* v. *Herdman's Ltd.,* 41 F.R.D. 275 (S.D.N.Y. 1966), the court found that the unsupported conclusory allegations of conspiracy were insufficient to defeat a fully supported summary judgment motion. The court noted that:

> "The controlling authorities in this Circuit on the summary judgment rule, sometimes referred to as "restrictive" in its application, are not without their outer limits; while the rule is to be applied cautiously so as not to deprive a party of his right to a trial where a genuine issue of facts exists, there must be a showing

that such an issue does exist, and mere conclusory allegations are not a substitute for such proof. Formal allegations which are not supported evidentially by affidavits do not raise a triable issue of fact and are insufficient to prevent the entry of summary judgment." 41 F.R.D. at 278.

See also *Moran* v. *Bench,* 353 F.2d 193 (1st Cir. 1965) *cert. denied,* 384 U.S. 906; *Washington Post Co.* v. *Keogh,* 365 F.2d 965 (D.C. Cir. 1966) *cert. denied* 385 U.S. 1011; *Beaufort Concrete Co.* v. *Atlantic States Construction Co.,* 352 F.2d 460 (5th Cir. 1965) *cert. denied,* 384 U.S. 1004; *Scolnick* v. *Lefkowitz,* 329 F.2d 716 (2d Cir. 1964); *2361 State Corp.* v. *Sealy, Inc.,* 263 F. Supp. 845 (N.D. Ill. 1967); *O'Hara* v. *Mattix,* 255 F. Supp. 540 (W.D. Mich. 1966).

In sum, far from revolutionizing the procedures under Rule 56, the lower courts correctly applied appropriate standards.

POINT IV

Petitioner's Rights to Disclosure Under Rule 56(f) Were Not Unduly or Unfairly Limited.

Petitioner's Rule 56(f) discovery was sought and obtained in order to resist Cities' motion for summary judgment. It was, accordingly, framed to meet the need asserted by petitioner, *i.e.,* to dispute the overwhelming documentary material which Cities adduced demonstrating that petitioner's charges were unfounded.

Thereafter, every Cities Service employee who was still alive (if petitioner had not stretched the eight-month discovery program into six years, he could have had his examination of Mr. Jones before the latter died) specified by petitioner was examined by petitioner as to every alleged issue of fact which petitioner claimed.

These issues of fact included:

(a) the negotiation of the Kuwait contract;

(b) the acquisition by Cities of an option to participate in the Consortium;

(c) a host of issues relating to the alleged turnabout and whether or not it took place, and, if so, whether it was the result of joining the alleged conspiracy; and

(d) the relationship, if any, between Cities and the abortive Richfield negotiations.

Having had this thorough discovery, in order, allegedly, to enable petitioner to resist the motion for summary judgment, petitioner was forced to admit that each of his prior alleged issues of fact was without foundation, and that he had no evidence to justify the claim that Cities joined the conspiracy.

Instead of seeking to demonstrate what further examination would have been appropriate, petitioner demeans the scope of the discovery which he received under Rule 56(f). His comments are either inaccurate or misleading, or both. Thus, petitioner is not correct in stating that the order was limited in time "to the period from the date when plaintiff's associates first met with Cities to a date just after the Jones entourage returned from Iran". Pet. Br. p. 31. True, petitioner was granted examination as to that period, the period during which petitioner claimed Cities' drastic change of position took place. The time limit in the order was thus created by petitioner's own claims as to the area to be explored by him. See Tr. Vol. III, 108-110; Tr. Vol. II, 417a-419a.

But petitioner was also authorized to inquire as to conversations and communications between Cities, petitioner

and all defendants from June to September, 1953, the time period when petitioner claimed Cities *may have* interfered with his potential sale of oil to the Richfield Company.

As to subject matter, petitioner maintains "the order was limited to specified items encompassing some of the relevant issues but preventing the development of others." (Pet. Br. p. 32). He fails, however, to specify these "other" issues and nowhere explains their relevancy.

Petitioner's efforts to examine into transactions unrelated to the allegations of the complaint, in which Cities hoped to engage, such as the Baluchistan concession (Pet. Br. p. 36), were properly rebuffed. Those transactions are simply not material to petitioner's case, whatever it is.

The fact that Cities maintained a central file relating to Iran called "the Iranian room" some time after November 1, 1952 is wholly irrelevant to any issue of fact between petitioner and Cities, and there is nothing to support petitioner's wild assertion that he was denied access to the documents once lodged in that room (*id.* at 34-35). Nor was he denied access to the relevant documents found in Mr. Jones' file. To the contrary, since all Cities' Iranian documents were filed in that room and since petitioner has had production of all Cities' documents within the scope of the various orders, it is clear that the assertion is wrong as well as wild. And some of the documents produced clearly came from Jones' files. The short answer is that petitioner was not denied access to relevant documents.

Petitioner's complaint that Cities relied on documents dated after November, 1952 (*id.*, pp. 34-35), while he was denied access to post-November, 1952 documents, does not warrant serious consideration. These documents were produced to counter plaintiff's now-abandoned contention that Cities had changed its position and lost interest in Iranian

oil. The documents demonstrated a consistent, nonconspiratorial, anti-monopolistic course of conduct by Cities, which petitioner now concedes was the case. See pp. 31-32; 35-38 above.

Petitioner's final assertion that the scope of the order was unduly restrictive because it was "limited to 'conversations and communications', not facts" (Pet. Br., p. 32) disregards the fact that at that stage of the proceedings he was seeking to establish that the (non-existent) turnabout was the result of Cities communications with the alleged conspirators. Ergo the inquiry into "communications and conversations".

The cases cited by petitioner in support of his claim that his discovery was unduly limited are all inapposite. All relate to other issues—the scope of Rule 26 General Discovery—the standards of proof applicable to determining whether a conspiracy exists—and the like. To the extent the cases have any pertinence they support Cities position. Indeed, Cities asks that its conduct be looked at "as a whole" (*United States* v. *Patten*, 226 U.S. 525, 544 (1913), cited at page 44 of petitioner's brief), from the beginning to the end, including the Davis opinion and the Hoover meeting and the facts conceded by petitioner to the Court below and now ignored by him.

Looking at the case "as a whole" there is nothing left of petitioner's case as to which further discovery of Cities or of the other defendants could be relevant. Petitioner now asks only: Did Cities conspire?—a conclusory question that is not a specific fact or evidentiary datum, nor even a claim. Indeed, petitioner *now* alleges in his brief to this Court "that, at a date unknown to petitioner, Cities joined the conspiracy." Pet. Br., p. 31. Petitioner, after years of discovery, cannot specify where, when, how or why this occurred or a single act evidencing that conclusion.

It is axiomatic that a deposition must be directly or indirectly germane to some issue of fact. Even under the broad Federal Rules, which permit examinations in order to find evidence, there must be some issue of fact as to which the evidence sought has a relationship.

In the case at bar, there is simply no issue of fact as to which further examination of Cities or other defendants could conceivably be pertinent.

The speculative inquiry, "Why did Cities fail to take over the Iranian oil industry?" is not an issue of fact; it is a question. And the record supplies the answer to that question.

And the question, "Did Cities Service conspire?" is again not an issue of fact but a question as to an ultimate conclusion. The answer to the question supplied by the documentary record is a clear and indisputable "No."

On this record it was not an abuse of discretion for the trial judge to refuse to grant further examinations under Rule 56(f) in order to enable petitioner to take the depositions of unnamed people employed by other defendants as to unspecified factual matters. Petitioner at no time identified a single such witness who allegedly had any knowledge or information whatsoever relevant to the issues on the summary judgment.

Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court *may* refuse the application for judgment or *may* order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or *may*

make such other order as is just." (Emphasis supplied)

"To obtain relief under this provision, however, the opposing party must show good reasons why he cannot present facts essential to justify his opposition." 3 Barron & Holtzoff, Federal Practice and Procedure, § 1238, p. 174.

Professor Moore, summarizing the case law, states:

"Exercising a sound discretion [under Rule 56(f)] the trial court then determines whether the stated reasons are adequate. And, absent abuse of discretion, the trial court's determination will not be interfered with by the appellate courts." 6 *Moore's Federal Practice* ¶¶ 56.24, 5615[6], pp. 2873-2874; 2429 (2d ed. 1965); See also, *e.g., Bond Distributing Co.* v. *Carling Brewing Co.*, 32 F.R.D. 409, 414-415 (D. Md. 1963), *aff'd* 325 F.2d 158, 159 (4th Cir.); *McKay* v. *American Potash & Chemical Co.*, 268 F.2d 512 (9th Cir. 1959); *Rivieri* v. *Scanlon*, 254 F. Supp. 469 (S.D.N.Y. 1966).

No basis for interfering with the lower's court's discretion has been established.

Rather, the position taken by petitioner comes down to the following: that once a complaint alleges that a defendant has become a conspirator, a plaintiff has an unlimited right of inquiry even more extensive than the right of a grand jury. That right continues at least as long as he asks the question, "Did the defendant conspire?" and as long as there may remain *possible* witnesses who *might* have information which *might* show a defendant was a co-conspirator, who have not yet been examined.

This the court below correctly refused to permit. Once every factual issue specified by petitioner was explored

by the petitioner, the District Court drew the line. We respectfully submit that to have done otherwise would have been an abuse of discretion.

The Federal Rules on discovery permit a party almost unlimited rights to seek evidence. The cost of litigation in the Federal courts has become astronomical because of the scope of pretrial proceedings permitted under the rules. To have permitted further discovery under Rule 56(f) at this point, given the state of the record, would have meant that petitioner had secured a permanent license to conduct an investigation of Cities Service merely by filing a document denominated "complaint" containing the magic word "conspire."

As Professor Moore states, an opponent of summary judgment is not entitled:

> "to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. 6 Moore, Federal Practice ¶ 56.15(4) at 2372 (2d ed. 1965).

This petitioner failed to do and still fails to do.

CONCLUSION

The summary judgment rule is particularly important in the "big case". Where an issue of fact could be tried and disposed of in a day or two, the difference between an argument for summary judgment and a trial is minimal, and the burden upon a party flowing from a determination that an issue should be tried instead of disposed of summarily is not substantial. The summary judgment rule, accordingly, has minimal impact in such a small case.

Its maximum utility is in the big case. To suggest that the remedy should not be available in a big case renders it almost meaningless. Indeed, from the point of view of judicial administration, it is in the big case where the rule makes the most sense. And in terms of avoiding unfair burdens upon a party, where the cost of litigation becomes extremely burdensome, it is the big case where summary judgment is particularly appropriate. To hold or to imply, as petitioner suggests, that the rule should not be applicable in antitrust cases (Pet. Br. p. 48) would give a plaintiff in such a case an unfair advantage and an improper weapon against a defendant.

The philosophy underlying Rule 56 has two aspects—one with respect to litigants and one with respect to the administration of justice.

With respect to the litigants: It puts into better balance the capacity of the plaintiff to inflict the lawsuit and its accompanying expenses and agonies on the defendant, and the capacity of the defendant to rid himself of this burden.

The plaintiff's capacity to inflict this burden is, by virtue of this Rule, not unlimited. When he is challenged, the plaintiff must justify his invasion of the rights of the defendant, otherwise the power to sue would be the power to punish regardless of the merits. This has become increasingly more important as the pretrial stage has grown in extent, variety and expense, and as trials have become longer and costlier. This is particularly true in an antitrust case which is the exemplar of the so-called protracted case.

From the point of view of judicial administration, it is obvious that, since the trial time of the judiciary is limited, it should be reserved for genuine and not for sham controversies. And, again, this is peculiarly true in deal-

ing with what promises to be a protracted case calling for special consideration.

A litigant who has no occasion to litigate is deprived of nothing by summary judgment except the power to waste his, his adversary's and the court's time.

The facts as applied to this case show that this petitioner's showing went through three screenings. At the end of the first screening he was able to show no claim but he made a plea for a chance to find one. On the second screening he was able to find no claim but he made a plea for the opportunity to fabricate one. On the third stage he was able to show no claim but he filed a plea that he was entitled to inflict pain on the defendant for its own sake in the hope that maybe the defendant would settle. This plea was denied.

In these circumstances, the granting of summary judgment should be affirmed.

Respectfully submitted,

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